Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Sean Bernat, *et. al.*,

Petitioners,

v.

The Honorable Michael G. Allphin, *et. al.*,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court For The State Of Utah

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The State of Utah employs a two-tier trial system to provide misdemeanant defendants with their right to appeal from a court not of record (the justice court) to a trial de novo in a court of record (the district court). Defendants in Utah who appeal the decision from the court not of record appear before the court of record convicted of the very crime for which they will be tried again. Utah's scheme does not vacate the judgment of the justice court prior to the appeal and receipt of the de novo trial in the court of record.

I. Whether Utah's failure to permit the justice court defendant to face his de novo trial while still burdened by the result of the first conviction violates the Double Jeopardy Clause of the United States Constitution.

II. Whether Utah's two-tiered system violates Due Process by requiring the defendant to file a certificate of probable cause and earn a right to appeal that is otherwise guaranteed him by federal constitutional safeguards.

III. Whether Utah's two-tiered system violates the federal constitutional tenet of Equal Protection of the law by providing disparate treatment for similarly situated criminal defendants.

LIST OF ALL PARTIES

(with dates of the Utah Court of Appeals decisions joined in the Bernat case)

Sean Bernat v. The Honorable Michael G. Allphin,
2003 UT App 394, Decided June 12, 2003

Jeremy Kee v. The Honorable Bruce C. Lubeck,
2003 UT App 177, Decided May 30, 2003

Donald Lang v. The Honorable Ann Boyden,
2003 UT App 176, Decided May 30, 2003

Darrin Mann v. The Honorable Glen R. Dawson,
2003 UT App 383, Decided June 12, 2003

Matthew Phillips v. The Honorable Donald J. Eyre,
2002 UT App 311, Decided June 12, 2003

Joseph Scovell v. The Honorable Denise P. Lindberg,
2003 UT App 8, Decided June 12, 2003

Dylan T. Serre v. The Honorable Michael K. Burton,
2002 UT App 264, Decided June 12, 2003

Mark Wahlstrom v. The Honorable Glen R. Dawson,
2002 UT App 309, Decided June 12, 2003

Henry T. Zakharian v. The Honorable Michael K. Burton,
2003 UT App 111, Decided April 17, 2003

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Judgment appealed from:

Bernat v. Allphin, 106 P.3d 707, 2005 UT 1. The opinion is attached in Appendix A.

Opinions from the lower court:

Bernat v. Allphin, Order Denying Petition for Extraordinary Relief. Utah Court of Appeals. Filed Jun 12, 2003. See Appendix B. Citing Zakharian v. Burton, 2003 UT App 111. Opinion not for official publication. Filed April 17, 2003. Also see Appendix C.

Centerville City v. Bernat, 2002 UT App 394. opinion not for official publication. Filed November 29, 2002. The opinion is attached in Appendix D.

STATEMENT OF JURISDICTION

The Utah Supreme Court denied petitioners their federal constitutional claims of double jeopardy, due process and equal protection violations on January 7, 2005. The opinion is attached in Appendix A.

CONSTITUTIONAL PROVISIONS

The Fifth and Fourteenth Amendments to the United States Constitution are reproduced in Appendix E.

STATEMENT OF THE CASE

Rule 4-608 of the Utah Rules of Judicial Administration, Utah Code Ann. § 78-5-120 and Rule 27 of the Utah Rules of Criminal Procedure (hereinafter "the Utah scheme," provisions reproduced in Appendix F) establish the appellate process for a defendant convicted of a misdemeanor in the justice courts of Utah. Importantly, Utah's justice courts are not courts of record. The Utah scheme requires that those charged and convicted of misdemeanor crimes in the justice court receive their constitutionally protected appellate rights by appealing to the district court (the Utah trial court with original jurisdiction and a court of record). In the district court the defendants receive a trial de novo.

Defendants in Utah who appeal the decision from the justice court, however, find themselves facing trial in the district court still convicted of the very crime for which they will be tried again. Utah's scheme does not vacate the judgment of the justice court on filing the appeal and on receipt of the de novo trial in the court of record.

The petitioners herein, after suffering convictions from a variety of justice courts throughout Utah, independently filed timely notices of appeal to the respective district courts as permitted by the Utah scheme. On facing their de novo trials for the same charges they were convicted of in justice court, and while remaining convicted of those justice court adjudications, petitioners filed motions to dismiss their cases due to the federal constitutional violations of double ~~jeop~~ardy, due process and equal protection rights.

Specifically, petitioners did not challenge that a trial de novo is an unconstitutional application of the right to appeal. That issue has been decided by this Court. Rather, petitioners claimed that Rule 4-608 of the Utah Rules of

Judicial Administration, Utah Code Ann. § 78-5-120 (1953 as amended) and Rule 27 of the Utah Rules of Criminal Procedure operate to violate Petitioners constitutional rights in three distinct ways.

First, double jeopardy rights are violated by the process that requires Petitioners to arrive in district court for a trial de novo while still under jeopardy from a justice court conviction.

Second, due process rights are violated by the process which unconstitutionally shifts the burden of proof and persuasion to the accused requiring him to demonstrate that he must earn a right to appeal that is guaranteed him by constitutional safeguards. Due process also is violated by the procedures which are contrary to the presumptions of innocence and burdensome to the protected rights to a fair trial.

Third, equal protection guarantees are violated when others similarly situated as petitioners are offered greater protections. Others charged with the same and similar misdemeanor offenses that begin their charges in district court enjoy greater rights than those offered to petitioners and those similarly situated whose cases begin in the justice courts.

The respondent district court judges named as parties herein failed to vindicate the important constitutional protections complained of and redress was sought individually by the petitioners at the Utah Court of Appeals.

Appeals to the Utah Court of Appeals were routinely dismissed by that court asserting a lack of jurisdiction because petitioners' appeals allegedly failed to challenge a statute or ordinance and were therefore not permitted an additional appeal beyond the trial de novo. See Appendix C.

Petitioners next filed for extraordinary relief with the Utah Court of Appeals requesting a writ of mandamus to direct the district courts to correct the erroneous denial of the motions to dismiss based on violations of the federal constitution. The Utah Court of Appeals entered orders denying the Petitions for Extraordinary Relief. See Appendix B.

Petitioners then prepared and filed with the Utah Supreme Court a Petition for Writ of Certiorari to the Utah Court of Appeals. Petitioners joined together in the Petition before the Utah Supreme Court. Their Petition was granted by the Utah Supreme Court on September 25, 2003. The Utah Supreme Court, however, denied petitioners claims in the opinion now the subject of this Petition for Writ of Certiorari. The Utah Supreme Court's opinion is attached at Appendix A.

ARGUMENT

COMPELLING REASONS FOR ISSUANCE OF THE WRIT OF CERTIORARI

The Utah Supreme Court, in authoring Bernat v. Allphin, 106 P.3d 707, 2005 UT 1, decided important questions of federal law that has not been, but should be, settled by this Court. Rule 10(c), Rules of the Supreme Court of the United States.

The Utah Supreme Court's treatment of the federal issues presented in Bernat decided important federal issues in a way that conflicts with relevant decisions of this Court. Rule 10(c), Rules of the Supreme Court of the United States.

The Utah Supreme Court in Bernat decided important federal questions in a manner conflicting with decisions of other state courts of last resort. Rule 10(b), Rules of the Supreme Court of the United States.

Point I. The Utah Supreme Court erroneously decided that double jeopardy is not violated by Utah's scheme which fails to vacate the first tier conviction prior to defendant appearing at the second tier de novo trial.

A. This issue has not been addressed previously by this Court, and should be settled by this Court as raised in this case.

Petitioners urged the Supreme Court of Utah to find a federal double jeopardy violation in the Utah two tiered scheme that provides misdemeanor defendants their appellate

right through a second tier trial de novo without vacating the judgment of the first tier non-record court. Petitioners' claim is supported both explicitly and impliedly by this Court's prior rulings in a number of two-tiered cases. Colten v. Kentucky, 407 U.S. 104 (1972), Ludwig v. Massachusetts, 427 U.S. 618 (1976) and Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984). None of these cases, however, focused on the precise issue presented in this case. The Utah Supreme Court agreed stating as follows:

> Neither Colten, Ludwig, nor Lydon directly addressed whether a sentence imposed in a justice court must be vacated pending a de novo trial. Nevertheless, Petitioners argue that the explicit and implicit language in these cases requires such action to survive constitutional scrutiny under the Double Jeopardy Clause. We disagree.

Bernat v. Allphin, 2005 UT 1, ¶ 22.

The Utah court acknowledged and conceded, however, that the above cited cases discuss the importance of vacating the conviction and cleaning the slate prior to the de novo trial:

> We acknowledge that a defendant's ability to automatically obtain a "clean slate" on appeal from a justice court conviction played an important role in the Court's determination that the systems examined in Colten, Ludwig, and Lydon were constitutional. However, the Kentucky and Massachusetts systems examined in those cases were structured in such a way that a defendant appealing a conviction from a justice court was best viewed as if he or she had successfully appealed a district court conviction, obtained a reversal, and been granted a new trial. See

> Ludwig, 427 U.S. at 631 ("A defendant who elects to be tried de novo [under the Massachusetts system] is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial."). Utah's justice court system is different.

Bernat, 106 P.3d 707, 2005 UT 1 at ¶ 23. The court correctly decided that Utah's scheme is different than those systems examined by the United States Supreme Court but erroneously concluded that those differences do not require the first tier conviction to be vacated.

In finding no double jeopardy violation the Utah Supreme Court misconstrued the critical import of what petitioners believe is a threshold constitutional question and requirement to vacate the conviction in the first tier adjudication prior to providing the de novo trial. In fact, both the petitioners and the court referenced many of the same quotations and authority for their respective positions. This Court should reach the double jeopardy issue presented in this Petition, correct the state court's interpretation and resolve whether federal rights are violated by a state scheme to utilize two tiered systems without vacating judgments occurring in the first tier on the filing of the appeal to the trial de novo.

In its analysis the Utah court erroneously deduced that Utah's scheme did not suffer from double jeopardy violations of constitutional significance under the theories (1) that jeopardy does not terminate when a defendant is convicted in the justice court and (2) that this concept of continuing jeopardy is supported because the defendant alone elects whether to file an appeal to instigate the de novo trial and somehow removes any possible double jeopardy concern. The Utah Supreme Court reasoned:

> Thus, we conclude that Utah's two-tier justice court system does not violate the prohibition against double jeopardy, even though a defendant's sentence from justice court is not automatically vacated pending a trial de novo in district court. Jeopardy does not terminate when a defendant is convicted in justice court; therefore, a defendant is not placed twice in jeopardy when he or she requests a de novo trial. Because "'nothing in the Double Jeopardy Clause prohibits a [s]tate from affording a defendant two opportunities to avoid conviction and secure an acquittal[.]'" Lydon, 466 U.S. at 312 (quoting Ludwig, 427 U.S. at 632).

Bernat, 106 P.3d 707, 2005 UT 1 at ¶ 33(citation in original).

To reach its conclusion the court misplaced reliance on Lydon to conclude the continuing jeopardy argument could be applied to Utah's scheme. It is the former Massachusetts system addressed in Lydon, not Utah's scheme, which is constitutionally different. This Court explained the uniqueness in Lydon as follows:

> Under Massachusetts law, a defendant charged with certain crimes in Boston Municipal Court may elect either a bench trial or a jury trial. If a defendant chooses a jury and is convicted, he has the normal appellate process open to him, while a defendant dissatisfied with the results of a bench trial, if he elects that course, has an absolute right to a trial de novo before a jury. A convicted defendant who has chosen a bench trial need not allege error at that trial to obtain de novo review. On the other hand, he may not rely upon error at the bench trial to obtain reversal of his conviction; his only recourse is a trial de novo.

Lydon, 466 U.S. at 297(citations and footnote omitted). At first blush, this quote appears to support the Utah court's analysis. Later in the opinion, however, this Court reminded that the key aspect of the Lydon ruling for purposes of this issue on appeal is that the first tier conviction is in fact vacated. The Lydon Court stated:

> A number of features of the Massachusetts system persuade us that it does not constitute "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect," even when a defendant convicted at the first tier claims insufficiency of the evidence.
>
> We note at the outset that Lydon was in "jeopardy" in only a theoretical sense. Although technically "jeopardy" under the Double Jeopardy Clause entails the "potential or risk of trial and conviction, not punishment," it is worthy of note that ***virtually nothing can happen to a defendant at a first-tier trial that he cannot avoid.*** He has an absolute right to obtain the de novo trial, and he need not allege error at the first-tier trial to do so. ***Once the right to a de novo trial is exercised, the judgment at the bench trial is "wiped out."***

Lydon, 466 U.S. at 310(quoting Price v. Georgia, 398 U.S. 323, 329 (1970)(citations omitted)(emphasis added).

The Utah Supreme Court misplaced its focus on the idea that Lydon's issue was distinct than that herein. Lydon reviewed the question whether a state could provide a two tier system without violating double jeopardy concerns. That issue has never been postulated by petitioners. Rather petitioners claim has always been on whether vacating the judgment of the first tier court is required under Fifth

Amendment Double Jeopardy jurisprudence as a threshold consideration.

Importantly, the "continuing jeopardy" concept embraced by a faction of the Lydon Court [and refuted by another] passed constitutional muster only because the Court found that the Massachusetts system placed a defendant "in jeopardy only in a theoretical sense." Id. at 310. This determination was reached due to the observation that "virtually nothing could happen to a defendant at a first-tier trial that he [could] not avoid" because the absolute right to a de novo trial "wiped out" the bench trial judgment. Id. The "wiping out" of all the lower court's consequences in conjunction with the appeal for the de novo trial is the linchpin of this reasoning. In fact, contrary to the Utah court's analysis, the continuing jeopardy discussion in Lydon only becomes reasonable by understanding that the defendant can choose to continue his original jeopardy by opting for the de novo trial, thereby annulling the first tier judgment. Only then are double jeopardy concerns alleviated when the defendant stands before the second tier de novo trial unencumbered by the prior conviction.

Absent the automatic "wiping out" or "cleaning of the slate," basic to the Court's reasoning, the defendant's state of jeopardy is not theoretical at all, but is real. Utah's reliance on "continuing jeopardy" as justification not to vacate the judgment fails to cure constitutional defects as the Utah scheme lacks the critical protections the system at issue in Lydon possessed. As stated by one of the concurrences in Lydon, the Utah decision amounts to little more than the "mere incantation of the phrase "continuing jeopardy," partak[ing] in the sort of "conceptual abstractions" that [this Court's] decisions elaborating the requirements of the Double Jeopardy Clause have attempted to avoid." Lydon, 466 U.S. at 315 (Brennan, J. Concurring in part).

In clear and unambiguous terms the Lydon Court, talking about the different system in Massachusetts, reiterated the nature of double jeopardy protections, to wit:

> Our cases have recognized three separate guarantees embodied in the Double Jeopardy Clause: It protects (1) against a second prosecution for the same offense after acquittal, **(2) against a second prosecution for the same offense after conviction,** and (3) against multiple punishments for the same offense.

Lydon, 466 U.S. at 306-07(citing Illinois v. Vitale, 447 U.S. 410, 415 (1980). The Utah Supreme Court adopted this quote from Lydon cataloging the vagaries of multiple prosecutions but confuses the prohibitions of second prosecutions. The language quoted by the court from Green v. United States is provided without the bookended comments from either side of the quote extolling the original purposes to the protection against double jeopardy:

> The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.
>
> . . . . .
>
> The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.

Green, 355 U.S. 184, 187-88 (1957)(quoting United States v. Ball, 163 U.S. 662, 669 (1896). This Court has more recently reaffirmed this earlier statement, from Ball, by

explaining, "The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried." Price v. Georgia, 398 U.S. 323 (1970). This expanded perspective of the purpose of double jeopardy protections discredits the Utah court's analysis.

Perhaps of greater concern and an even more compelling example of the Utah Supreme Court's result oriented jurisprudence in denying petitioners constitutionally protected rights is the courts treatment expounding the design and purpose of the lower tier courts. The court, citing Colten, supports its decision on the nature of the justice courts quoting this Court as follows:

> [These courts] are designed, in the interest of both the defendant and the State, to provide speedier and less costly adjudications than may be possible in the criminal courts of general jurisdiction.

Bernat, 106 P.3d 707, 2005 UT 1 at ¶ 32 (quoting Colten, 407 U.S. at 114.

Importantly, the quote is inequitably interrupted mid-sentence to dissuade and rule against petitioners' argument. The remainder of the quote, picked up in mid-sentence from where the Utah Supreme Court abruptly stopped, importantly continues as follows:

> . . . [first purpose of justice courts is speed and less costly than general jurisdiction courts] *where the full range of constitutional guarantees is available*; second, if the defendant is not satisfied with the results of his first trial he has *the unconditional right* to a new trial in a superior court, ***unprejudiced by the proceedings or the outcome in the inferior courts***.

Colten, 407 U.S. at 114 (emphasis added). This deliberate approach by the court to justify its scheme at the expense of double jeopardy rights demonstrates this Court's need to grant the Writ of Certiorari.

Petitioners respectfully request the Court grant the Petition for Writ of Certiorari in this matter and decide the question whether the double jeopardy provision of the federal constitution requires that states, through the fourteenth amendment, vacate the conviction from the first tier on the defendants invocation of his right to the de novo trial in two tiered schemes like that of Utah.

B. Prior authority of this Court requires states to vacate judgments from the first tier court once the de novo trial is requested.

This Court, on at least three occasions, has reviewed de novo appellate systems, each time for reasons similar to yet distinct from that presented in this Petition. Importantly, each time the Court has addressed the subject of de novo trial appellate review in the two-tiered system the Court has provided both explicit and implicit language instructing that Utah's scheme violates double jeopardy principles.

In each of the cases reviewed, this Court acknowledged that the convictions from the trial in the non court of record must be vacated before the de novo trial can begin.

In 1972 the Court rejected a complaint that an enhanced punishment at the trial de novo violated due process and double jeopardy. Colten v. Kentucky, 407 U.S. 104 (1972). The Court examined the two-tiered appellate process of Kentucky and repeatedly recognized the requirement that the second prosecution continues without any consequence or remaining jeopardy from the results of the first prosecution.

> Kentucky, like many other States, has a two-tier system for adjudicating less serious criminal cases. In Kentucky, at the option of the arresting officer, those crimes classified under state law as misdemeanors may be charged and tried in a so-called inferior court, where, as in the normal trial setting, a defendant may choose to have a trial or to plead guilty. If convicted after trial or on a guilty plea, however, he has a right to a trial de novo in a court of general criminal jurisdiction, so long as he applies within the statutory time. The right to a new trial is absolute. A defendant need not allege error in the inferior court proceeding. ***If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean. Prosecution and defense begin anew. . . . The case is to be regarded exactly as if it had been brought there in the first instance.*** A convicted defendant may seek review in the state appellate courts in the same manner as a person tried initially in the general criminal court. However, a defendant convicted after a trial or plea in an inferior court may not seek ordinary appellate review of the inferior court's ruling. His recourse is the trial de novo.

Colten, 407 U.S. at 112-13 (emphasis added; citations omitted). Later the Court stated:

> We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available. Proceedings in the inferior courts are simple and speedy, and, if the results in Colten's case are any evidence, the penalty is not characteristically severe. *Such proceedings offer a defendant the opportunity to learn about the prosecution's case and,*

> *if he chooses, he need not reveal his own. He may also plead guilty without a trial and promptly secure a de novo trial in a court of general criminal jurisdiction.* He cannot, and will not, face the realistic threat of a prison sentence in the inferior court without having the help of counsel, *whose advice will also be available in determining* ***whether to seek a new trial, with the slate wiped clean,*** *or to accept the penalty imposed by the inferior court.* The State has no such options. Should it not prevail in the lower court, the case is terminated, whereas the ***defendant has the choice of beginning anew.***

Colten, 407 U.S. at 118-19 (emphasis added).

Importantly, the Kentucky scheme analyzed in Colten expressly provided that on the filing of the appeal the sentence of the justice court was to be vacated.

> In all instances, a defendant in Kentucky facing a criminal sentence is afforded an opportunity to be tried de novo in a court presided over by a lawyer-judge ***since an appeal automatically vacates the conviction*** in police court. The trial *de novo* is available after either a trial or a plea of guilty in the police court; a defendant is entitled to bail while awaiting the trial.

North v. Russell, 427 U.S. 328, 334-35 (1976)(citations omitted)(emphasis added). Notably, the North Court concluded that a two-tiered de novo trial system utilizing non-lawyer judges in the inferior court violated neither due process nor equal protection precisely because the accused were provided a de novo trial under the Kentucky scheme before a court of general criminal jurisdiction. Id. at 337-39. Significantly, the Court relied on language from Colten noting:

> A defendant can have an initial trial before a lawyer-judge by pleading guilty in the police court, thus bypassing that court and seeking the De novo Trial, "erasing . . . any consequence that would otherwise follow from tendering the (guilty) plea."

Id. at 337 (quoting Colten v. Kentucky, 407 U.S. at 119-20). Utah permits non-lawyer judges in justice courts. That use of lay judges in Utah justice courts is not itself a violation as explained in North; except that the conviction obtained from that justice court in Utah is not vacated on the filing of the Notice of Appeal as the North Court analyzed as the saving principle in such cases. Utah's failure to "wipe the slate clean" and "begin anew" in the court of general criminal jurisdiction renders the Utah scheme unconstitutional under double jeopardy grounds.

As in Colten, the system in Ludwig survived scrutiny precisely because the jeopardy from the first case was vacated under the Massachusetts's scheme and any consequences of that conviction terminated prior to or with the filing of the notice of the accused's intent to take his trial de novo appeal. Massachusetts's scheme survived the constitutional challenge for the same reason Kentucky's scheme survived. Each system vacated the conviction from the inferior court on filing the notice to appeal. Again, Utah's scheme contrarily does not vacate the conviction from the inferior court. When Petitioners arrive in district court in Utah they therefore face jeopardy for the second time on the same charges of which they are currently guilty—in violation of double jeopardy safeguards.

Ludwig demonstrates this critical difference at the outset of the opinion as the Court explains the procedure employed.

> Unlike the two-tier Kentucky system under consideration in Colten v. Kentucky an accused in Massachusetts does not avoid trial in the first instance by pleading guilty. Nevertheless, he achieves essentially the same result by an established, informal procedure known as "admitting sufficient findings of fact." This procedure is used "[i]f the defendant wishes to waive a trial in the District Court and save his rights for a trial in the Superior Court on the appeal." The trial court then hears only enough evidence to assure itself that there is probable cause to believe that the defendant has committed the offense with which he is charged. The court, however, does make a finding of guilt and enter a judgment of conviction.
>
> *Once a person convicted in the [inferior jurisdiction] indicates that he is going to appeal,* ***his conviction is vacated.***

Ludwig, 427 U.S. at 621-22 (emphasis added; citations omitted). The Court then later added a significant observation:

> *The decision to secure a new trial rests with the accused alone.* A defendant who elects to be tried de novo in Massachusetts is in *no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial.* Under these circumstances, it long has been clear that the State may reprosecute. The only difference between an appeal on the record and an appeal resulting automatically in a new trial is that ***a convicted defendant in Massachusetts may obtain a "reversal" and a new trial without assignment of error in the proceedings at his first trial.*** Nothing in

> the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal.

Ludwig, 427 U.S. at 631-32 (emphasis added; citations omitted). The Court in Ludwig highlights the critical distinction missing from our Utah scheme that ***"[o]nce a person convicted in the [first court] indicates that he is going to appeal, his conviction is vacated."*** Ludwig, 427 U.S. at 621-22 (emphasis added).

Finally, in Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984), the United States Supreme Court again included as a part of its holding the very important factual understanding of the rules pertinent to Massachusetts. The exact issue in the case is distinct from that presented in this writ; yet the Court's conclusions against Lydon fully support and establish that the first and underlying conviction is vacated on inception of the de novo trial as an appeal.

> We note at the outset that Lydon was in "jeopardy" in only a theoretical sense. *Although technically "jeopardy" under the Double Jeopardy Clause entails the "potential or risk of trial and conviction, not punishment," **it is worthy of note that virtually nothing can happen to a defendant at a first-tier trial that he cannot avoid.*** He has an absolute right to obtain the de novo trial, and he need not allege error at the first-tier trial to do so. ***Once the right to a de novo trial is exercised, the judgment at the bench trial is "wiped out."***

Lydon, 466 U.S. at 310 (emphasis added; citations omitted). The Court then added:

> To put the matter another way, as we observed in Colten v. Kentucky, a defendant's choices in a two-tier system are [i]n reality . . . to accept the decision of the judge and the sentence imposed in the inferior court ***or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of a judge or jury in the superior court, with sentence to be determined by the full record made in that court.***

Lydon, 466 U.S. at 312 (emphasis added; citation omitted). Notably, the reliance by the Lydon Court on Colten requires inclusion of the concluding comment by the Court in Colten v. Kentucky when it states:

> Colten urges that his [double jeopardy] claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. . . . *The contention [of Colten] also ignores that a defendant can bypass the inferior court simply by pleading guilty and* ***erasing immediately thereafter any consequence*** *that would otherwise follow from tendering the plea.*

Colten v. Kentucky, 407 U.S. at 119-20. Critically, Utah's scheme falls short of those schemes from Massachusetts and Kentucky examined and approved by the United States Supreme Court as discussed in the above cases.

Unlike Utah's scheme, the systems evaluated in these cases vacate the judgments of the prior jeopardy in order to place the accused in the appropriate constitutional posture before a new trial. Utah justice courts, by rule and practice, are not "*erasing immediately thereafter any consequence*" on filing of a notice of appeal as required by the double jeopardy clauses and the decisions from the Supreme Court. Rather,

the Utah justice courts leave the convicted justice court defendant under jeopardy while sending him to appeal to the district court by de novo trial, thereby violating the double jeopardy provision of successive prosecutions on the same charges.

This Court should issue the Writ of Certiorari as prior decisions from this Court demonstrate the erroneous nature of the Utah Supreme Court's opinion.

C. The Utah Supreme Court's decision to not vacate the judgment from the first tier court is in conflict with decisions of other state courts of last resort.

Over twenty years ago this Court made note in Lydon of the number of states that incorporate a two-tier system for adjudicating less serious criminal offenses. Lydon, 466 U.S. at 112 (listing statutory references to 24 different states that had incorporated a two-tier system). Utah's two tiered de novo appellate scheme and the holding in this case now before the Court are in conflict with many of the two tiered systems of those other states.

In examining how other states work with a two-tier system, we begin with those systems which have already undergone the scrutiny of this Court. This Court has reviewed and deemed as constitutional the two-tier systems in Massachusetts, Kentucky and North Carolina – all three of these states share as a common characteristic the "clean slate" petitioners contend is required. See Ludwig, 427 U.S. at 632 (stating that a convicted defendant in Massachusetts may obtain a reversal and a new trial without assignment of error in the proceedings at his first trial.); Lydon, 466 U.S. at 310 (commenting that once the right to a de novo trial is exercised, the judgment at the bench trial is "wiped out.");

Colten, 407 U.S. at 113 (asserting that if a defendant seeks a new trial the Kentucky statutory scheme contemplates that the slate be wiped clean); Blackledge v. Perry, 417 U.S. 421, 422 (1974)(mentioning that in North Carolina any defendant convicted in District Court has an absolute right to a trial de novo in Superior Court, and when the appeal is taken . . . the slate is wiped clean; the prior conviction is annulled, and the prosecution and the defense begin anew in the Superior Court).

The court below acknowledged that "a defendant's ability to automatically obtain a "clean slate" on appeal from a justice court conviction played an important role in the [Supreme] Court's determination that the systems examined in Colten, Ludwig, and Lydon were constitutional." See Bernat, 106 P.3d 707, 2005 UT 1 at ¶ 23. The Utah court does not offer sufficient justification for a system to exist without such a protection, it merely posits that the posture of the defendant justifies maintaining their guilty status. Id. The fact remains that regardless of how a defendant's posture is framed, any system requiring convicted defendants to face an entirely "new trial" on the same facts is disingenuous and in violation of Fifth Amendment double jeopardy protections.

Along with this Court's more than incidental treatment of the role of a "clean slate" in a trial de novo, a number of other states have explained the critical requirement of vacating the lower court's conviction as a constitutionally essential component of their two-tier systems.

For example, case law from the state of Kansas demonstrates that "Kansas has codified the protection against double jeopardy" and directly applied the same to their two-tier system. Salina v. Amador, 85 P.3d 724, 726 (Kan.App. 2004). The relevant Kansas code section provides:

> (1) A prosecution is barred if the defendant was formerly prosecuted for the same crime, based upon the same facts, if such former prosecution:
> (a) Resulted in either a conviction or an acquittal.

Kan. Stat. Ann. § 21 – 3108(1)(a) (2003). This section has been construed by the Kansas courts to stand for the premise that a defendant's "conviction by the municipal court [is] vacated when he appeal[s] to the district court for a trial de novo." Amador, 85 P.3d at 727.

The Supreme Court of New Hampshire has spoken regarding their framework of their two-tier system. According to the highest court in New Hampshire:

> A person convicted by a district or a municipal court of a class A misdemeanor, at the time the sentence is declared, *may appeal therefrom to the superior court which shall hear the appeal.* The effect of such an appeal is to vacate that judgment and transfer the whole proceeding to the Superior Court, there to be tried *de novo* on the original complaint.

State v. Guy, 667 A.2d 1026, 1027 (N.H. 1995)(emphasis in original, internal quotations and citations omitted).

The courts in Connecticut have defined as well the position of their state regarding necessary steps to protect against double jeopardy. The courts in this state have long held that, "It is well settled in this state that an appeal from the judgment of a justice of the peace vacates the judgment of the justice, and the case stands in the appellate court precisely as though brought there in the first instance." State v. Ashman, 153 A. 654, 655 (Conn. 1931); Ely v. Bugbee, 90 Conn. 584, 588, 98 A. 121, 123 (Conn. 1916).

Alabama speaks forcefully with regard to this question. According to Alabama law, "when an appeal is allowed by statute from the judgment of an inferior court to a superior court, where the case is to be tried de novo, . . . a trial *de novo* means a new trial 'as if no trial had ever been had, and just as if it had originated in the circuit court.'" Ball v. Jones, 132 So.2d 120, 122 (1961). This stance has been given even further clarification as another Alabama court asserted: "A trial de novo means that the slate is wiped clean and a trial in the Circuit Court is had without any consideration being given to prior proceedings in another Court." Clark v. City of Mobile, 357 So.2d 675, 678, (Ala.Crim.App. 1978)(quoting Yarbrough v. City of Birmingham, 353 So.2d. 75 (Ala.Crim.App. 1977)). Yet another court in Alabama further clarified, "[w]hen on appeal the case is triable de novo, it stands as though no judgment had ever been rendered in the lower court." Jones v. City of Daphne, 519 So.2d. 587 (Ala.Crim.App. 1986).

Maine echoes the protective language of these other states in their consideration of this issue. The Supreme Court in Maine expressed the view that "a defendant found guilty in the District Court ha[s] a right to appeal and get a trial de novo. When the case comes before the Superior Court, the entire slate is wiped clean as if brought there initially. An entirely different court hears the case anew." State v. Palmer, 468 A.2d 985, 988 (Me. 1983).

Indiana takes a similar view with their process, contending that in their two-tier system, "The appeal [to the higher court], in fact, is more than a stay of the judgment of conviction before the justice. It vacates that judgment and transfers the whole proceeding to the court appealed to, there to be tried . . . de novo." Hensley v. State, 244 N.E.2d 225, 227 (Ind. 1969).

These examples of states that hold the opposing viewpoint of the Utah Supreme Court's ruling is not intended to be exhaustive, but rather to serve as an illustration of the split of authority in interpreting two tiered jurisprudence. These examples also demonstrate the pressing need for this Court to grant this Petition and determine the matter.[1]

Some states have ruled consistent with Utah's court. In the state of Washington, "A trial de novo in superior court as the result of a conviction and appeal taken in municipal court does not signal the initiation of an entirely new criminal process or procedure." Seattle v. Crockett, 551 P.2d 740, 741-742 (Wash. 1976). The Washington system maintains that, "The slate has not been wiped clean . . . The judgment of conviction rendered by the municipal court still exists and the appeal merely suspends operation of the judgment." Id. Although the Washington system fails to vacate the lower court conviction, it is worth noting that the automatic suspension of the judgment offers a defendant more protection than the Utah scheme. See e.g., City of St. Louis v. Rollins, 32 S.W.3d 187, 189 (Mo.App. E.D., 2000) (explaining that the filing of an application for trial de novo alone does not vacate or annul the municipal court's judgment, but that the application for appeal merely suspends the execution of the judgment pending final disposition of the trial de novo.) See Petitioner's Point II, Due Process Argument.

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[1] Notably, California and Massachusetts have recently taken measures to eliminate the two tier systems they once had in place. See generally General Electric Capital Auto Financial Services, Inc. v. Appellate Division, 105 Cal.Rptr.2d 552 (Cal.App.2.Dist., 2001) (discussing at length the trial court unification following a 1998 voter proposition authorizing an amendment to the state constitution); See also Stone v. State, 685 A.2d 441, 449 (Md. App. 1996) (noting that as of January 1, 1994, Massachusetts abolished their two-tier system).

Unfortunately, this disagreement or split existing among the states identifies that an individual's Fifth Amendment double jeopardy protection fragilely is dependent upon the state in which he resides. This Court should grant the Petition for Writ of Certiorari and resolve the conflict in interpretation of the fifth amendment rights.

II. Whether Utah's two-tiered system violates Due Process by requiring the defendant to file a certificate of probable cause and earn a right to appeal that is otherwise guaranteed him by federal constitutional safeguards.

The Utah trial de novo scheme, including Rule 4-608 of the Rules of Judicial Administration, Utah Code Ann. § 78-5-120 and Rule 27 of the Utah Rules of Criminal Procedure (see Appendix F) operates to deny the petitioners their constitutionally protected rights to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Besides violating double jeopardy rights, the scheme violates due process in a variety of ways: (a) impermissibly discourages and burdens the accused in his attempt to exercise his constitutional right to appeal, and (b) unlawfully shifts the burden to the accused requiring that he demonstrate and earn a right to appeal that is actually guaranteed him by the state constitution.

A. Our Utah scheme impermissibly discourages and burdens the right to appeal.

This Court often has demonstrated the inappropriateness of encumbering constitutionally protected rights.

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

Rinaldi v. Yeager, 384 U.S. 305, 310-11 (1966) (citing Douglas v. California, 372 U.S. 353 (1963); Lane v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 372 U.S. 487 (1963); Griffin v. Illinois, 351 U.S. 12 (1956)).

The Utah scheme violates this well established rule by making it extremely burdensome to get a stay prior to the trial de novo, particularly if a forthwith sentence is ordered by the justice court. The timelines alone for a hearing on the petition are draconian as they relate to justice court matters. Often times a justice court sentence could be served before the rigorous steps of a certificate of probable cause are met.

For example, a certificate of probable cause cannot be issued except upon application of the defendant. Rule 27(d)(1). The application must

> be in writing and supported by a memorandum of law identifying the issues to be presented on appeal and supporting the defendant's position that those issues raise a substantial question of law or fact reasonably likely to result in reversal, an order for a new trial or a sentence that does not include a term of incarceration in jail or prison.

Rule 27(d)(2). The rule allows the prosecution 10 days to respond, and allows the court an additional 10 days after that to hear the matter. If the prosecution fails to respond the court still can wait fifteen days to hear the matter and no requirement is provided for the court to rule on the matter within any time frame. If the justice court denies the petition,

then the matter must be presented to the district court and these time lines are repeated. Meanwhile the sentence may be served while the accused is awaiting his automatic appeal in the form of a new trial.

Moreover, the economic burdens placed on a justice court defendant to accomplish even one round of filing a petition, let alone the possibility, if not the likelihood of the second round, are prohibitive for a system designed to advantage citizens in its simplicity. Likewise, numerous litigants in justice courts proceed pro se and are without the legal ken to maneuver these procedures independently. Such procedural hurdles violate due process by overly-burdening an accused in his pursuit to effect his guaranteed right to appeal the decision of the justice court to a court of record.

In fact, no circumstances actually exist for a justice court judge to find that the accused is not entitled to a de novo trial given the language in the rule itself and in the statute which guarantees the accused that right once timely requested. Notably, the rule itself (2)(d) makes no mention of the certificate but rather refers only to the filing of the notice of the appeal.

This state scheme process needlessly and impermissibly "chills" the right of the justice court defendant to appeal. In United States v. Jackson, 390 U.S. 570, 581 (1968), this Court examined legislation, the Federal Kidnapping Act, which more harshly punished defendants who elected to exercise their trial rights over those agreeing to a plea bargain. The government argued that the intent of the legislation was to mitigate punishment for those who cooperated. The government claimed the incidental effect of inducing defendants not to fully contest their charges was irrelevant. To that position the Jackson Court stated the following:

> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. The question is not whether the chilling effect is "incidental" rather than intentional; *the question is whether that effect is unnecessary and therefore excessive*. In this case the answer to that question is clear. . . . Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. . . . For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.

Id. at 581-83 (emphasis added; citations omitted). Due process is violated by the rule and the statute specifically as it relates to justice court cases.

B. Our Utah scheme unlawfully shifts the burden to the accused.

Our most basic principles of criminal law permit an accused to be tried while enjoying, inter alia, the presumption of innocence. Due process is violated on these facts because Rule 4-608 and § 78-5-120 eviscerate this presumption of innocence and place on an accused an impermissible burden and create a chilling effect on the exercise of appellate rights afforded under Utah's constitution and the Constitution of the United States. The scheme requires the filing of a petition and a memorandum of points and authorities in support of that petition to gain the appeal that the constitution and the scheme themselves identify as an automatic right on timely filing of the notice to appeal. Art. 1, § 12, Constitution of Utah (1896); Utah Code Ann. § 78-5-120 (2001).

This Court stated the following in In re Winship, 397 U.S. 358, 368 (1970):

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Seven years later this Court reaffirmed the point and added:

> [A] State must prove every ingredient of an offense beyond a reasonable doubt, *and . . . may not shift the burden of proof to the defendant* by means of such a presumption.

Sandstrom v. Montana, 442 U.S. 510 (1979)(citations omitted; emphasis added). These quotes identify the infirmity contained in rule 4-608, that the defendant who is convicted in the justice court must meet an affirmative duty to prove or persuade the court of his automatic right to appeal. The de novo trial is an entitlement under the Constitution of Utah and the very scheme employed to provide him his appeal.

The Utah scheme requiring a certificate of probable cause to gain a right already guaranteed is too fraught with the potential to harass and otherwise burden an important constitutional right.

This Court should declare unconstitutional as violative of due process considerations this Utah scheme which impermissibly shifts the burden to the defendant to establish that he has constitutionally protected rights to appeal.

III. Whether Utah's two-tiered system violates the federal constitutional tenet of Equal Protection of the law by providing disparate treatment for similarly situated criminal defendants.

The Fourteenth Amendment of the United States Constitution prohibits the states from enacting laws that deny "any person within its jurisdiction equal protection of the laws."

Petitioners assert that equal protection rights assured by both constitutions are violated by Rule 4-608 and § 78-5-120 because the scheme they establish for an accused to perfect an appeal requires facing a second de novo trial while maintaining a guilty status from the justice court. These same circumstances are not true had the accused initially been charged in the court of record and then received a new trial on remand from the appellate court. E.g., Colten v. Kentucky, 407 U.S. 104 (1972). In the later circumstances his conviction would be purged prior to the second or new trial.

The equal protection violation occurs not because the Utah scheme has allowed the defendants to receive different types of process, but precisely because when facing the second trial as discussed above the two types of defendants are not and must not be treated any differently. Both the justice court defendant on his trial de novo and the district court defendant on his retrial after reversal of his conviction and remand from the appellate court *must* be treated the same. At that juncture in the process both defendants are indistinguishable; they are both defendants charged with crimes in a tribunal within the state and they both possess the full panoply of rights afforded anyone accused in this country of committing a criminal violation. In re Winship, 397 U.S. at 368.

This Court examined an analogous appellate situation with a New Jersey statute that authorized extracting an expense for transcripts and concluded as follows:

> Apart from its fiscal objective, the only other purpose of this law advanced by the appellees is the deterrence of frivolous appeals. Assuming a law enacted to perform that function to be otherwise valid, the present statutory classification is no less vulnerable under the Equal Protection Clause when viewed in relation to that function. By imposing a financial obligation only upon inmates of institutions, the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed.
>
> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. We may assume that a State can validly provide for recoupment of the cost of appeals from those who later become financially able to pay. But any such provision must, under the Equal Protection Clause, be applied with an even hand.

Rinaldi, 384 U.S. at 310-11 (citations omitted). The Court struck down the statute in question.

Similarly, on these same equal protection grounds, this Court should correct our scheme which treats similarly situated defendants at the retrial procedures differently and thereby unconstitutionally under equal protection safeguards.

CONCLUSION

For all or any of the foregoing reasons, Petitioners respectfully request this Court to grant the petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 7th day of April, 2005.

BENJAMIN A. HAMILTON
Attorney for Petitioners

This opinion is subject to revision before final publication in the Pacific Reporter.

IN THE SUPREME COURT OF THE STATE OF UTAH

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Sean Bernat, Lesa Beuchert, Jeremy Kee, Brandon Kvenvold,Donald Lang, Darrin Mann, Matthew Phillips, Joseph Scovell, Dylan T. Serre, Mark Wahlstrom, and Henry T. Zahkarian,

Plaintiffs and Petitioners,

v.

The Honorable Michael G. Allphin, The Honorable Ann Boyden, The Honorable Michael K. Burton, The Honorable Glen R. Dawson, The Honorable Donald J. Eyre, The Honorable Denise P. Lindberg, The Honorable Bruce C. Lubeck,

Defendants and Respondents.

No. 20030567

FILED
January 7, 2005

2005 UT 1

Original Proceeding in the Utah Court of Appeals

Attorneys: Benjamin A. Hamilton, Salt Lake City, for petitioners

Brent M. Johnson, Salt Lake City, for respondents

On Certiorari to the Utah Court of Appeals

DURRANT, Justice:

¶1 Petitioners challenge the constitutionality of Utah's two-tier justice court system, arguing that this system violates the prohibition against double jeopardy and denies defendants due process and equal protection under the law. They assert that, in light of these alleged violations, the court of appeals abused its discretion when it refused to issue writs of mandamus directing various district courts to dismiss the charges against Petitioners. We reject Petitioners' constitutional challenges and affirm the court of appeals.

BACKGROUND

¶2 Petitioners Sean Bernat, Lesa Beuchert, Jeremy Kee, Brandon Kvenvold, Donald Lang, Darrin Mann, Matthew Phillips, Joseph Scovell, Dylan T. Serre, Mark Wahlstrom, and Henry T. Zakharian (collectively "Petitioners") were convicted of various crimes in several justice courts throughout the state.[1] Each appealed his or her conviction to a district court and, once in district court, challenged the constitutionality of Utah Rule of Judicial Administration 4-608,[2] which governs trial de novo appeals from justice court proceedings in criminal cases. See Utah R. Jud. Admin. 4-608. Specifically, Petitioners challenged the constitutionality of rule 4-608(4),[3] which requires an individual who is convicted in justice court to obtain a certificate of probable cause in order to stay a justice court sentence pending a de novo trial in district court. Petitioners argued that this requirement violates constitutional double jeopardy prohibitions, as well as due process and equal protection guarantees.

¶3 When the district courts denied Petitioners' motions to dismiss the charges against them, Petitioners appealed to the court of appeals. Because Utah Code section 78-5-120(7) gives the court of appeals jurisdiction over justice court appeals only where the district court has ruled on the constitutionality of a statute or ordinance and not a rule, see Utah Code Ann. § 78-5-120(7) (Supp. 2002), the court of appeals held that it lacked jurisdiction to entertain the appeals and dismissed them accordingly. Petitioners thereafter petitioned the court of appeals for writs of mandamus directing the district courts to grant Petitioners' motions to dismiss on double jeopardy, due process, and equal protection grounds. The court of appeals declined to grant Petitioners' requests, reasoning that Utah's two-tier justice court system was not constitutionally deficient and concluding that Petitioners had failed to demonstrate a "gross or flagrant abuse of discretion" or a "particularly egregious and momentous legal error" that would justify granting the petitions.

¶4 This court granted Petitioners' request for certiorari review of the court of appeals' decision. We have jurisdiction pursuant to Utah Code section 78-2-2(3)(a) (2002).

STANDARD OF REVIEW

¶5 "[T]he granting of [a] writ [of mandamus] is always a matter of discretion with th[e] court and never a matter of right on behalf of the applicant." State v. Ruggeri, 429 P.2d 969, 971 (Utah 1967); see also Renn v. Utah State Bd. of Pardons, 904 P.2d 677, 683 (Utah 1995) ("With respect to mandamus . . . , a court has discretion in granting requested relief."). Thus, whether the court of appeals properly refused to issue a writ providing the relief requested by Petitioners is a matter that we review for an abuse of discretion. Osborne v. Adoption Ctr. of Choice, 2003 UT 15, ¶ 22, 70 P.3d 58.

ANALYSIS

¶6 Before addressing whether the procedures set forth in Utah Rule of Judicial Administration 4-608 violate the prohibition against double jeopardy or deny defendants due process or equal protection as Petitioners allege, we first provide a brief overview of the operation of Utah's two-tier justice court system.

I. UTAH'S TWO-TIER JUSTICE COURT SYSTEM

¶7 Justice courts are courts "not of record,"[(4)] authorized by article VIII, section 1 of the Utah Constitution and governed by the Utah Code. See Utah Code Ann. §§ 78-5-101 to -140 (2002). Justice courts are created by municipalities or counties, id. § 78-5-101.5, and have jurisdiction over certain small claims cases, "class B and C misdemeanors, violation of ordinances, and infractions committed within [the justice courts'] territorial jurisdiction, except those offenses over which the juvenile court has exclusive jurisdiction," id. § 78-5-104.

¶8 Because justice courts are courts not of record, the appeals process from a justice court decision is unique. A defendant who has pleaded guilty or been convicted in justice court is entitled to a trial de novo in a district court, provided that he or she files a notice of appeal within thirty days of the sentence or guilty plea. Id. § 78-5-120(1). If a defendant desires to have an adverse judgment stayed pending a trial de novo before the district court, the defendant must also obtain a certificate of probable cause. Utah R. Jud. Admin. 4-608(4). The justice court makes the determination in the first instance of whether to grant an application for a certificate of probable cause. Id. 4-608(5). If a justice court denies the application, a defendant may apply to the district court for a stay.[(5)] Id. Like justice courts, a district court will only stay a sentence if it issues a certificate of probable cause. Utah R.

Crim. P. 27(a)(2). A defendant's application for a certificate of probable cause must be in writing and

accompanied by a memorandum of law identifying the issues to be presented on appeal and supporting the defendant's position that those issues raise a substantial question of law or fact reasonably likely to result in reversal, an order for a new trial[,] or a sentence that does not include a term of incarceration in jail or prison.

Id. 27(d)(2). A district court may issue a certificate of probable cause only if the court finds that the appeal "is not being taken for the purpose of delay" and "raises substantial issues of law or fact reasonably likely to result in reversal, an order for a new trial[,] or a sentence that does not include a term of incarceration in jail or prison." Id. 27(f).

¶9 Petitioners argue that the process outlined above violates double jeopardy, due process, and equal protection, and that, as a result of these violations, the court of appeals abused its discretion in refusing to issue writs of mandamus ordering the district courts to dismiss the charges against Petitioners. We examine each of these alleged constitutional violations in turn.

II. UTAH'S TWO-TIER JUSTICE COURT SYSTEM DOES NOT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY

¶10 Both the United States and Utah Constitutions prohibit the state from placing an individual twice in jeopardy for the same offense.[6] U.S. Const. amend. V; Utah Const. art. I, § 12. In jury trials, jeopardy attaches after a jury has been selected and sworn. Illinois v. Somerville, 410 U.S. 458, 466 (1973); State v. Cram, 2002 UT 37, ¶ 8, 46 P.3d 230. In bench trials, jeopardy attaches after the first witness is sworn

and the court begins to hear evidence. Crist v. Bretz, 437 U.S. 28, 37 n.15 (1978); State v. Musselman, 667 P.2d 1061, 1065 (Utah 1983). Because Petitioners have not provided a separate analysis of the double jeopardy protections afforded under our state constitution, we limit our review to examining the constitutionality of Utah's justice court system under federal law. See State v. Seale, 853 P.2d 862, 873 n.6 (Utah 1993).

¶11 The Double Jeopardy Clause embodies three separate protections: (1) protection against a second prosecution for the same offense after acquittal, (2) protection against a second prosecution for the same offense after conviction, and (3) protection against multiple punishments for the same offense. Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 306-07 (1984). "The primary purpose of foreclosing a second prosecution after conviction . . . is to prevent a defendant from being subjected to multiple punishments for the same offense." Id. at 307.

¶12 Petitioners do not argue that Utah's justice court system subjects them to the possibility of multiple punishments, nor do they contend that recourse from a justice court conviction in the form of a trial de novo violates double jeopardy per se. Rather, Petitioners argue that Utah's justice court scheme impermissibly places a defendant twice in jeopardy because the system does not automatically "wipe the slate clean" and void the judgment against a justice court defendant while his or her trial de novo is pending before the district court. Petitioners maintain that "[o]ur system of justice cannot allow an accused to exercise his right to appeal by de novo trial in district court while standing before that court convicted of the exact offense he will be tried for a second time." In support of this assertion, Petitioners cite the United States Supreme Court's decisions in Colten v. Kentucky, Ludwig v. Massachusetts, and Justices of Boston Municipal Court v. Lydon, arguing that under these cases, the

Constitution requires justice court sentences to be vacated on appeal. We review each of these decisions before addressing Petitioners' contention.

A. The Supreme Court's Examination of Two-Tier Justice Court Systems in Colten, Ludwig, and Lydon

¶13 The Supreme Court first examined the constitutionality of a two-tier justice court system in Colten v. Kentucky, 407 U.S. 104 (1972).[7] Under the Kentucky system, a defendant convicted in a justice court proceeding who requested a new trial within the specified statutory time frame was guaranteed an absolute right to a trial de novo in a court of general criminal jurisdiction. Id. at 112-13. If a defendant sought a new trial, the Kentucky system essentially wiped the slate clean by vacating the defendant's sentence. The prosecution and defense would begin anew and the trial de novo would be in no way bound by the justice court's findings or judgment. Id. at 113. In other words, the case would be regarded exactly as if it had been brought in the court of general jurisdiction in the first instance. Id.

¶14 In Colten, a defendant who was first convicted and fined ten dollars in a justice court exercised his right to appeal his conviction through a trial de novo in a court of general jurisdiction, where he was once again convicted and fined a sum of fifty dollars. Id. at 107-08. On appeal, the Kentucky Court of Appeals rejected the defendant's argument that the larger fine imposed during his trial de novo violated the constitutional protections outlined in North Carolina v. Pearce, 395 U.S. 711 (1969). See Colten, 407 U.S. at 108.

¶15 The Supreme Court affirmed the court of appeals' decision. Id. at 120. The Court acknowledged that Pearce forbids the imposition of a greater punishment following a successful appeal but rejected the assertion that the Kentucky system was infirm simply because the trial de novo judge

was able to impose a harsher sentence than that imposed by the justice court. Id. at 115-17. More importantly, the Court also rejected in dicta the contention that the Pearce protections were needed "to minimize an asserted unfairness to criminal defendants who must endure a trial in an inferior [justice] court with less-than-adequate protections in order to secure a trial comporting completely with constitutional guarantees." Id. at 118. The Court was unpersuaded that the Kentucky system "disadvantage[d] defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance," explaining as follows:

> Proceedings in the inferior courts are simple and speedy, and, if the results in [the defendant's] case are any evidence, the penalty is not characteristically severe. Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. He may also plead guilty without a trial and promptly secure a de novo trial in a court of general criminal jurisdiction. He cannot, and will not, face the realistic threat of a prison sentence in the inferior court without having the help of counsel, whose advice will also be available in determining whether to seek a new trial, with the slate wiped clean, or to accept the penalty imposed by the inferior court.

Id. at 118-19. The Court further explained that

> [i]n reality, [a defendant's] choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court.

Id. at 119. Thus, Colten concluded that the Kentucky two-tier justice court system was not unconstitutional.

¶16 In Ludwig v. Massachusetts, 427 U.S. 618 (1976), the Court was called upon to examine the constitutionality of Massachusetts's two-tier justice court system--a system that differed in several major respects from the Kentucky system examined in Colten. Under the Massachusetts system, a defendant who pleaded guilty before a justice court could not receive a trial de novo; instead, a defendant could only challenge his or her sentence on appeal.[8] Id. at 620-21. Additionally, a defendant who pleaded not guilty before a justice court could only receive a trial by judge, not by jury. Id. at 621. Like the Kentucky two-tier justice court system, however, any conviction imposed by the justice court would be vacated upon indication that the defendant was appealing his conviction.[9] Id. at 621-22.

¶17 In Ludwig, the defendant was tried before a justice court. Id. at 623. At the outset of the trial, the court denied the defendant's request that he receive a trial by jury, and the defendant was thereafter adjudged guilty and fined. Id. In a de novo proceeding before a district court, the defendant moved unsuccessfully to dismiss the charges against him on the basis that the justice court proceedings deprived him of his constitutional right to a speedy trial by jury, and that the de novo trial proceeding constituted double jeopardy. Id. On appeal, the Supreme Judicial Court of Massachusetts affirmed the defendant's conviction. Id.

¶18 The Ludwig Court agreed that the Massachusetts system was constitutional. Id. at 630, 632. First, the Court reasoned that a defendant was not deprived of a right to a speedy jury trial merely because he or she was not entitled to a jury in the first instance. Id. at 626. Moreover, the Court also rejected the defendant's double jeopardy argument that the de novo procedure forced an accused to "risk" two trials, concluding that such an assertion was without substance. See id. at 627, 631. The Court explained as follows:

The decision to secure a new trial rests with the accused alone. A defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains reversal of his conviction and a remand of his case for a new trial. Under these circumstances it long has been clear that the [s]tate may reprosecute. The only difference between an appeal on the record and an appeal resulting automatically in a new trial is that a convicted defendant in Massachusetts may obtain a "reversal" and a new trial without assignment of error in the proceedings at his first trial. Nothing in the Double Jeopardy Clause prohibits a [s]tate from affording a defendant two opportunities to avoid conviction and secure an acquittal.

Id. at 631-32 (citation omitted).

¶19 The Supreme Court re-examined the constitutionality of the Massachusetts system in Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984).[10] There, a defendant who chose to proceed with his case in a first-tier bench trial was convicted and sentenced in a justice court. Id. at 297. The defendant thereafter requested a trial de novo and, before the trial commenced, moved to dismiss the charge against him on the ground that no evidence of intent had been presented during his first bench trial. Id. at 297-98. In support of his motion, defendant cited Burks v. United States, 437 U.S. 1 (1978), in which the Supreme Court held that double jeopardy bars a second retrial when an appellate court reverses a defendant's conviction for insufficient evidence. Lydon, 466 U.S. at 297. Although the trial court denied the defendant's motion to dismiss, a federal district court granted the defendant's petition for a writ of habeas corpus, which the First Circuit Court of Appeals subsequently affirmed. Id. at 298-300.

¶20 The Supreme Court reversed the federal courts, rejecting the assertion that its prior holding in Burks applied to a defendant's appeal from a justice court. Id. at 309-10. The Court explained that the reprosecution of a defendant after his or her conviction has been overturned on appeal is permitted under the concept of "continuing jeopardy," a principle under which proceedings against a defendant may continue as long as jeopardy has not terminated. See id. at 308-09. Under a continuing jeopardy rationale, the Court reasoned that the defendant could not identify any stage of the proceeding in his case where jeopardy was terminated. Id. at 309. Indeed, the Court noted that

> [w]hile technically [the defendant] is "tried again," the second stage proceeding can be regarded as but an enlarged, fact-sensitive part of a single, continuous course of judicial proceedings during which, sooner or later, a defendant receives more--rather than less--of the process normally extended to criminal defendants in this nation.

Id. (second alteration in original) (internal quotation omitted).

¶21 The Lydon Court also observed that the defendant "was in 'jeopardy' only in a theoretical sense." Id. at 310. It reasoned that under the Massachusetts two-tier system, "virtually nothing [could] happen to a defendant at a first-tier trial that he [could] not avoid" because the absolute right to a de novo trial, once exercised, "wiped out" the bench trial judgment. Id. Noting that a two-tier system actually affords benefits to defendants that are not available to defendants in a more conventional system, the Court concluded that retrying the defendant was constitutionally acceptable even if his first bench trial conviction rested on insufficient evidence. Id. at 312.

B. Colten, Ludwig, and Lydon Do Not Require Justice Court Sentences To Be Automatically Vacated

¶22 Neither Colten, Ludwig, nor Lydon directly addressed whether a sentence imposed in a justice court must be vacated pending a de novo trial. Nevertheless, Petitioners argue that the explicit and implicit language in these cases requires such action to survive constitutional scrutiny under the Double Jeopardy Clause. We disagree.

¶23 We acknowledge that a defendant's ability to automatically obtain a "clean slate" on appeal from a justice court conviction played an important role in the Court's determination that the systems examined in Colten, Ludwig, and Lydon were constitutional. However, the Kentucky and Massachusetts systems examined in those cases were structured in such a way that a defendant appealing a conviction from a justice court was best viewed as if he or she had successfully appealed a district court conviction, obtained a reversal, and been granted a new trial. See Ludwig, 427 U.S. at 631 ("A defendant who elects to be tried de novo [under the Massachusetts system] is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial."). Utah's justice court system is different.

¶24 Unlike Kentucky and Massachusetts, when a defendant convicted in a Utah justice court exercises his or her right to a trial de novo, the justice court system structures the de novo trial itself as an appellate review of the conviction--albeit in trial form instead of a more traditional form of appellate review. Thus, a defendant stands in a position similar to a district court defendant appealing his or her conviction before either this court or the court of appeals. And where jeopardy

has attached in the justice court proceeding and remains attached without termination during the trial de novo, continuing jeopardy allows for a defendant-initiated appellate review in the form of a de novo trial without implicating double jeopardy concerns. Cf. Lydon, 466 U.S. at 308-09.[11]

¶25 Utah's system is best viewed as placing defendants in the same position as district court defendants appealing their sentence in the first instance for several reasons. First, Utah's system is structured to allow district courts to exercise appellate jurisdiction. Article VIII, section 5 of the Utah Constitution clearly states that district courts "shall have appellate jurisdiction as provided by statute." Utah Const. art. VIII, § 5 (emphasis added). Consistent with this authority, the Utah Legislature has provided that district courts "ha[ve] appellate jurisdiction to adjudicate trials de novo of the judgments of the justice court." Utah Code Ann. § 78-3-4(5) (2002) (emphasis added). In light of this framework, we have previously held that in Utah, a trial de novo in district court satisfies the right to appeal from a justice court. City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah 1990).

¶26 Second, unlike the Kentucky system in Colten, the result of a trial de novo under the Utah system is tied to the justice court proceedings below. In Wisden v. District Court, 694 P.2d 605 (Utah 1984) (per curiam), this court held that a defendant convicted in justice court proceedings cannot receive a harsher penalty if subsequently convicted in a trial de novo. Id. at 605-06. Thus, a trial de novo before a district court is more properly regarded "as but an enlarged, fact-sensitive part of a single, continuous course of judicial proceedings during which, sooner or later, a defendant receives more--rather than less--of the process normally extended to criminal defendants in this nation." Lydon, 466 U.S. at 309 (internal quotation omitted).

¶27 Finally, the policies underlying the double jeopardy protections do not come into play when a justice court defendant requests a de novo trial. As previously noted, the Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. Id. at 306-07. These protections effectively bar the state from "mounting successive prosecutions" and wearing down the defendant, "'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" Id. at 307 (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)). They are also primarily intended "to prevent a defendant from being subjected to multiple punishments for the same offense." Id. (citing United States v. Wilson, 420 U.S. 332, 343 (1975)). None of these policy considerations are implicated under Utah's system.

¶28 There is no question that, in Utah, the state is prohibited from mounting successive prosecutions against a defendant who has been found not guilty in a justice court proceeding. In fact, the decision to secure a trial de novo in district court rests with the accused alone. Moreover, as Petitioners concede, there is no concern that a defendant could receive multiple punishments in both a justice court and a district court for the same offense.

¶29 Petitioners argue that viewing a de novo trial as equivalent to a traditional or "true appeal" is "misguided," asserting that doing so contradicts the meaning of "trial de novo" and "ignore[s] that the justice court system is significantly different" than other Utah courts. We disagree.

¶30 Petitioners correctly observe that the term "de novo" means literally "anew, afresh, a second time," Pledger v.

Cox, 626 P.2d 415, 416 (Utah 1981) (internal quotation omitted), and that the expression "trial de novo" can mean either (1) a complete retrial upon new evidence, or (2) a trial upon the record made before the lower tribunal, Univ. of Utah v. Indus. Comm'n, 736 P.2d 630, 632 (Utah 1987). Petitioners also correctly point out that we have used an appeal from a justice court to a district court as an example of the first "complete retrial upon new evidence" type of de novo trial, wherein "'the case is tried in the district court as if it originated there.'" Id. (quoting Denver & Rio Grande W. R.R. Co. v. Pub. Serv. Comm'n, 100 P.2d 552, 555 (Utah 1940)); see also Pledger, 626 P.2d at 416 (observing that the first "complete retrial upon new evidence" meaning of "de novo" is applicable to appeals from a justice court). Contrary to Petitioners' assertions, however, this language can be interpreted consistently with a trial de novo functioning as a true appeal.

¶31 "The meaning of 'trial de novo' . . . is obviously dictated by the wording and context of the statute in which it appears and by the nature of the . . . decision and procedure being reviewed." Pledger, 626 P.2d at 416-17. Here, a de novo trial is no less "anew," "afresh," or "a complete retrial upon new evidence" simply because it functions as a form of appellate review. The state bears the same burden of establishing a defendant's guilt in a trial de novo as it would had the case originated there, and a defendant is afforded a clean slate upon which to relitigate the facts as to his guilt or innocence. The outcome of the prior justice court proceeding plays no part in the trial de novo, except that a district court is prohibited from imposing a harsher sentence than that imposed by the justice court.[12]

¶32 Moreover, we reject the contention that a trial de novo cannot be considered on par with more traditional appeals simply because it differs in form. Justice courts "are designed, in the interest of both the defendant and the [s]tate,

to provide speedier and less costly adjudications than may be possible in criminal courts of general jurisdiction." Colten, 407 U.S. at 114. Due to this difference in design, it stands to reason that the differences between justice courts and district courts would necessitate different forms of appellate review. Because Utah justice courts are not "courts of record," it is not only constitutionally permissible to allow a defendant the opportunity to relitigate his or her case anew, but practically and reasonably sound.

¶33 Thus, we conclude that Utah's two-tier justice court system does not violate the prohibition against double jeopardy, even though a defendant's sentence from justice court is not automatically vacated pending a trial de novo in district court. Jeopardy does not terminate when a defendant is convicted in justice court; therefore, a defendant is not placed twice in jeopardy when he or she requests a de novo trial. Because "'nothing in the Double Jeopardy Clause prohibits a [s]tate from affording a defendant two opportunities to avoid conviction and secure an acquittal,'" Lydon, 466 U.S. at 312 (quoting Ludwig, 427 U.S. at 632), the court of appeals correctly determined that Utah's justice court system does not violate the Double Jeopardy Clause.

III. UTAH'S TWO-TIER JUSTICE COURT SYSTEM DOES NOT DENY A DEFENDANT DUE PROCESS OF LAW

¶34 In addition to their arguments regarding double jeopardy, Petitioners argue that Utah's two-tier justice court system operates to deny defendants their constitutionally protected due process rights. Specifically, Petitioners argue that Utah's system (1) discourages and burdens the right to appeal, (2) unlawfully shifts the burden to the accused to prove entitlement to an appeal, and (3) burdens the presumption of innocence. We address each of these arguments in turn.

¶35 In Rinaldi v. Yeager, 384 U.S. 305 (1966), the Supreme Court observed that once a state establishes avenues of appellate review, "it is . . . fundamental that . . . these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Id. at 310-11. Relying on this principle, Petitioners assert that the appeals process from a justice court impermissibly burdens a defendant's right to appeal by requiring him or her to prepare and file a petition for a certificate of probable cause. They argue that the procedures for obtaining a stay of a sentence prior to a trial de novo are "extremely burdensome," that the rules relating to the timing of a hearing on a petition are "draconian," and that "the economic burdens placed on a justice court defendant to accomplish even one round of filing a petition, let alone the possibility, if not the likelihood of the second round, are prohibitive for a system designed to advantage citizens in its simplicity." Petitioners argue that these procedural hurdles violate due process because they are overly burdensome, and that they thereby needlessly and impermissibly chill a justice court defendant's right to appeal.

¶36 Petitioners' argument is flawed in that it focuses on the perceived inadequacies relating to a defendant's ability to obtain a stay of his or her conviction, not on a defendant's ability to effectively appeal his or her conviction. A defendant convicted in justice court possesses an absolute entitlement to a trial de novo in the district court, provided he or she files a simple notice of appeal within thirty days of sentencing or the entry of a guilty plea. Utah Code Ann. § 78-5-120(1) (2002). Because the procedures for obtaining a stay, and any alleged difficulties arising therefrom, are wholly separate from and have no impact on a defendant's ability to appeal his or her conviction, see Utah R. Jud. Admin. 4-608(4), we cannot conclude that the stay procedures burden a defendant's right to appeal.

¶37 Petitioners further assert that Utah's justice court system places an impermissible burden on the accused to persuade the court of his or her automatic right to appeal. This assertion is also misguided. The memorandum of points and authorities Petitioners apparently believe is a necessary prerequisite for an appeal relates only to the issuance of a certificate of probable cause needed to obtain a stay of conviction--not a defendant's right or ability to appeal his or her conviction. See id.; Utah R. Crim. P. 27(d)(2). As such, a defendant is under no obligation to prove or persuade a court of any right to appeal.

¶38 Finally, Petitioners argue that several sections within Utah Rule of Judicial Administration 4-608 conflict and thereby implicate the due process rights of those effecting an appeal from justice courts. Aside from merely quoting or paraphrasing the language of these subsections, however, Petitioners provide no meaningful analysis as to how these sections conflict, or more importantly, why these alleged conflicts violate due process. Because we find this issue to be inadequately briefed, we decline to address it. Beehive Tel. Co. v. Pub. Serv. Comm'n, 2004 UT 18, ¶ 38, 89 P.3d 131.

¶39 In sum, we reject Petitioners' arguments and conclude that Utah's two-tier justice court system does not violate any of Petitioners' due process rights.[13]

IV. UTAH'S TWO-TIER JUSTICE COURT SYSTEM DOES NOT DENY A DEFENDANT EQUAL PROTECTION UNDER THE LAW

¶40 Petitioners' final challenge to the court of appeals' refusal to issue a writ of mandamus rests upon their assertion that Utah's justice court system denies defendants equal protection under the law. They assert that because a justice court defendant maintains a guilty status pending a trial de

novo, a justice court defendant is treated differently than a defendant who has obtained a new trial after successfully reversing his or her sentence on appeal. Petitioners argue that "Utah's failure to permit the justice court defendant to face his de novo trial free from the result of the first conviction . . . violates equal protection of the law." We find this argument to be without merit.

¶41 As a general matter, the Equal Protection Clause requires all persons similarly situated to be treated alike. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).[14] However, contrary to Petitioners' assertions, a defendant appealing from a justice court conviction is not in a similar position to a defendant who has been convicted in district court and subsequently secured the reversal of his or her sentence on appeal. Rather, a justice court defendant is in a similar position to a defendant appealing from a district court conviction in the first instance. When viewed from this correct perspective, a justice court defendant is, if anything, treated more favorably than a similarly situated district court defendant. Unlike defendants appealing from a district court conviction, a defendant convicted in justice court is afforded a second opportunity to relitigate the facts relating to his or her guilt or innocence after having had the advantage of learning about the prosecution's case during the first trial. Therefore, we find no equal protection violation in the operation of Utah's justice court system.

CONCLUSION

¶42 We are unpersuaded by Petitioners' assertions that Utah's two-tier justice court system either violates the constitutional prohibition against double jeopardy or denies a defendant due process or equal protection under the law. Accordingly, the court of appeals did not abuse its discretion in refusing to issue writs of mandamus directing the district courts to dismiss all charges against the Petitioners. Affirmed.

¶43 Associate Chief Justice Wilkins, Justice Parrish, and Justice Nehring concur in Justice Durrant's opinion.

DURHAM, Chief Justice, concurring:

¶44 I concur in this opinion, noting that I still maintain the views I expressed in my dissent in Monticello v. Christensen, 788 P.2d 513 (Utah 1990), but do not believe those views require a different result in this case.

1. Although Petitioners challenge the court of appeals' ruling with respect to these eleven individuals, Petitioners have only provided us with a record for the first named defendant, Sean Bernat. Since neither party argues to the contrary, we assume that the procedural background as to the other ten individuals is, for all relevant purposes, identical to that of Sean Bernat. We recite the facts of this case accordingly.

2. Since this action was filed, rule 4-608 has been repealed and replaced by Utah Rule of Criminal Procedure 38. Although the text of rule 38 is similar to that of rule 4-608, we rely on the procedures set forth in rule 4-608 for purposes of our analysis.

3. During the course of the proceedings below, rule 4-608 was renumbered effective April 1, 2002. Because the text in both versions is identical, we cite herein the renumbered version of the rule.

4. A court "not of record" is literally a court that does not maintain a record of the proceedings before it.

5. Subsection (e) of Utah Rule of Criminal Procedure 38 has eliminated the provision in rule 4-608(5), which states that "[i]f the justice court denies the application [for a certificate of probable cause], the defendant may apply to the district court for a stay under [Utah Rule of Criminal Procedure] 27." Compare Utah R. Crim. P. 38(e) with Utah R. Jud. Admin. 4-608(5).

6. The Double Jeopardy Clause of the United States Constitution was deemed to be applicable to the states through the Fourteenth Amendment in Benton v. Maryland, 395 U.S. 784, 794 (1969).

7. The terminology used to refer to two-tier court systems similar to Utah's justice court system varies from state to state. For clarity and convenience, we herein refer to these systems as "justice court systems" and to their courts as "justice courts."

8. Although a defendant could not simply plead guilty to avoid a trial in the first instance, as in Colten, the Massachusetts scheme allowed a defendant to essentially avoid a trial in the justice court through an informal procedure known as "admitting sufficient findings of fact." Ludwig, 427 U.S. at 621. Using this procedure, a justice court could hear enough evidence to assure itself that there was probable cause to believe the defendant committed the charged offense, make a finding of guilt, and enter a judgment of conviction against the defendant, which would allow the defendant to then exercise his or her right to a de novo trial. Id.

9. Although the Massachusetts system vacated a defendant's conviction on appeal, a defendant could nevertheless suffer adverse collateral consequences from his justice court conviction, including the revocation of parole or a driver's license. Ludwig, 427 U.S. at 622.

10. Following the Court's decision in Ludwig, Massachusetts modified its two-tier system to allow a defendant to avoid a first-tier trial and proceed directly to a jury trial. Lydon, 466 U.S. at 304. Thus, under the modified system, a defendant could either elect a jury trial in the first instance and, if convicted, seek review through the normal appellate process or elect a bench trial and, if convicted, exercise an absolute right to a trial de novo before a jury. Id. at 297.

11. Petitioners argue that the Supreme Court has repudiated the concept of continuing jeopardy. However, in Lydon, five justices explicitly acknowledged the continuing validity of this doctrine. 466 U.S. at 308-10.

12. In this respect, our observation that an appeal from a justice court requires a de novo trial to proceed "as if it originated there," Pledger, 626 P.2d at 416 (internal quotation omitted), is, in the strictest sense, incorrect, given that a district court cannot impose a greater sentence than the sentence imposed in the justice court proceeding, Wisden, 694 P.2d at 605-06.

13. Under Utah's two-tier justice court system, "[j]ustice court judges are not required to be admitted to practice law in the state as a qualification to hold office." Utah Code Ann. § 78-5-137 (2002). Petitioners suggest that a sentence imposed by a non-lawyer justice court judge violates due process under North v. Russell, 427 U.S. 328 (1976), if the sentence is not vacated pending a trial de novo. Because Petitioners have not argued, nor is there any indication in the record, that any of the Petitioners were sentenced by non-lawyer judges, the issue is not before us and we decline to address it. We observe, however, that such a scenario could conceivably raise due process concerns.

14. The Utah Constitution provides a similar protection, stating that "[a]ll laws of a general nature shall have uniform

operation." Utah Const. art. I, § 24. Although Petitioners cite the state constitution in support of their equal protection argument, they provide no separate state analysis. We therefore limit our review to a federal analysis. See State v. Seale, 853 P.2d 862, 873 n.6 (Utah 1993).

IN THE UTAH COURT OF APPEALS

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Sean Bernat,	)	
Petitioner,	)	ORDER DENYING
v.	)	PETITION FOR
	)	EXTRAORDINARY
The Honorable Michael	)	RELIEF
G. Allphin,	)	
Respondent.	)	Case No. 20030238-CA
	)	

Before Judges Jackson, Greenwood and Orme.

Petitioner Sean Bernat seeks a writ of mandamus directing the Respondent to grant a motion to dismiss all charges based upon claimed constitutional violations of double jeopardy, due process and equal protection.

This court rejected the identical constitutional claims asserted in this petition. See, e.g., Taylor v. Lubeck, 2003 Ut App 113 (per curiam) ; Ulmer v. Lubeck, 2003 UT App 110 (per curiam) ; see also Kee v. Lubeck, 2003 UT App 177 (per curiam); Lang v. Boyden, 2003 UT App 176 (per curiam); Beuchert v. Lubeck, 2003 UT App 174 (per curiam); Kvenvold v. Burton, 2003 UT App 173 (per curiam). Accordingly, we held that "[i]n the absence of a demonstration that application of rule 4-608 of the Code of Judicial Administration violates [Petitioner's] substantial constitutional rights, there is no basis from which to conclude that either 'gross or flagrant abuse of discretion' or 'particularly egregious and momentous legal error' has occurred to justify granting the petition." Taylor, 2003 UT App 113 at ¶12; Zakharian, 2003 UT App 111 at ¶12; Ulmer, 2003 UT App 110 at ¶12 (each quoting State v.

Stirba, 972 P.2d 918, 922 (Utah Ct. App. 1998)). We conclude that there is no basis on which to distinguish the claims in the present petition from those rejected by this court in Zakharian, Taylor, Ulmer, and similar cases.

IT IS HEREBY ORDERED that the petition for writ of mandamus is denied.

Dated this 12th day of June, 2003.

FOR THE COURT:

_____/s/_____
Norman H. Jackson,
Presiding Judge

_____/s/_____
Pamela T Greenwood, Judge

_____/s/_____
Gregory K. Orme, Judge

FILED
Utah Court of Appeals
June 12, 2003
Paulette Stagg
Clerk of the Court

2003 WL 21296817 (Utah App.), 2003 UT App 111
UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
Henry T. ZAKHARIAN, Petitioner,
v.
The Honorable Michael K. BURTON, Respondent.
No. 20030151-CA.
April 17, 2003.

Original Proceeding in this Court.
Benjamin A. Hamilton, Salt Lake City, for Petitioner.
Brent M. Johnson, Salt Lake City, for Respondent.

Before Judges JACKSON, BILLINGS, and BENCH.

MEMORANDUM DECISION

PER CURIAM:
*1 Petitioner Henry Zakharian seeks a writ of mandamus directing the Respondent "to grant [a] motion to dismiss all charges ... for constitutional violations of double jeopardy, due process, and equal protection."
Zakharian seeks review of the denial of a motion to dismiss on grounds that rule 4-608 of the Utah Rules of Judicial Administration is unconstitutional. Because Zakharian has no right to appeal this issue under Utah Code Ann. § 78-5-120 (2002), "pursuit of an extraordinary writ is procedurally correct." *Dean v. Henriod,* 975 P.2d 946, 948 (Utah Ct.App.1999). The petition alleges that Respondent abused his discretion by denying the motion to dismiss. Accordingly, the petition invokes rule 65B(d)(2)(A) of the Utah Rules of Civil Procedure.
Granting a writ of mandamus is always a matter of discretion with the appellate court. *See State v. Stirba,* 972 P.2d 918, 920 n. 2 (Utah Ct.App.1998). The petition cannot substitute

for an appeal; thus, it does not authorize the appellate court to exercise the same scope of review as on appeal or to circumvent statutory restrictions on an appeal. *See id.* at 920. Abuse of discretion for purposes of rule 65B(d)(2)(A) writs "must be much more blatant than the garden variety 'abuse of discretion' featured in routine appellate review." *Id.* An appellate court will act to correct only a "gross and flagrant abuse of discretion" or a "particularly egregious and momentous legal error." *Id.* at 923.

A defendant in a criminal case originating in a justice court is entitled to a trial de novo in district court. *See* Utah Code Ann. § 78-5-120(1) (2002). Rule 4-608(4) of the Code of Judicial Administration provides that "[u]pon the filing of the notice of appeal and the issuance of a certificate of probable cause as provided for in the Rules of Criminal Procedure, the judgment of the justice court shall be stayed."

Zakharian was convicted of Driving under the Influence of Alcohol and Possession of Drug Paraphernalia in the South Salt Lake Justice Court, and was again convicted following a trial de novo in Third District Court. Once in district court, Zakharian moved for dismissal of the charges on grounds that application of rule 4-608(4) constituted double jeopardy and denied him due process and equal protection under the law. Zakharian filed this petition after conviction, and after obtaining a stay of the sentence in the district court. Respondent argues that the petition should be dismissed based upon the delay in asserting the claim. We review the petition on its merits based upon the fact that the underlying case is stayed in district court and that court continues to exercise jurisdiction to conduct review hearings.

Zakharian first claims that section 78-5-120 and rule 4-608 violate constitutional guarantees prohibiting double jeopardy. A defendant appealing a justice court judgment has an unconditional right to a trial de novo "without regard to the judgment entered in a justice court." *State v. Hinson,* 966 P.2d 273, 275 (Utah Ct.App.1998). "The district court is not confined to the record before the justice court and need not

defer to the justice court's findings and determinations." *Id.* Following trial de novo, the district court "renders a new, distinct, and independent judgment." *Id.* Zakharian contends that if the justice court judgment is not automatically vacated, rather than stayed, the trial de novo will subject him to double jeopardy by a second trial on the same charges.

*2 The United States Supreme Court has rejected double jeopardy claims pertaining to similar "two tier systems." *See Justices of Boston Mun. Ct. v. Lydon,* 466 U.S. 294, 104 S.Ct. 1805 (1984); *Ludwig v. Massachusetts,* 427 U.S. 618, 96 S.Ct. 2781 (1976); *Colton v. Kentucky,* 407 U.S. 104, 92 S. Ct 1953 (1972). Noting that a defendant in a two tier system is in no danger of prosecution after an acquittal, the Court states that "[t]he decision to secure a new trial rests with the accused alone," who "is in no different position than a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand for a new trial." *Ludwig,* 427 U.S. at 631, 96 S.Ct. at 2788. The Court continued:

The only difference between an appeal on the record and an appeal resulting automatically in a new trial is that a convicted defendant ... may obtain a "reversal" and a new trial without assignment of error in the proceedings at his first trial. Nothing in the Double Jeopardy Clause prohibits a state from affording a defendant two opportunities to avoid conviction and secure an acquittal.

Id. at 632, 96 S.Ct. at 2788-89.

In *Colton,* the Supreme Court rejected a claim that the possibility of a harsher penalty following a trial de novo violated double jeopardy, reasoning that the defendant had the option "to seek a new trial with the slate wiped clean, or to accept the penalty imposed by the inferior court." *Colton,* 407 U.S. at 119, 92 S.Ct. at 1961. In *Lydon,* the Supreme Court adopted the characterization of the second tier proceeding as "part of a single, continuous course of judicial proceedings during which ... a defendant receives more--rather than less--of the process normally extended to criminal

defendants." *Lydon,* 466 U.S. at 310, 104 S.Ct. at 1814. Therefore, the second tier trial did not violate double jeopardy guarantees by providing a defendant with "two opportunities to avoid conviction and secure an acquittal." *Id.* at 312, 104 S.Ct. at 1815.

Zakharian has not demonstrated that Utah's two tier system violates the Double Jeopardy Clause and, specifically, has not demonstrated that the justice court's judgment must be vacated pending appeal. A defendant appealing a justice court conviction has an absolute right to a trial de novo. *See* Utah Code Ann. § 78-5-120. The district court is not bound by the justice court judgment, but it cannot impose a harsher sentence. *See Wisden v. District Court,* 694 P.2d 605, 606 (Utah 1984). Zakharian has not demonstrated that he is entitled to dismissal of the charges.

Zakharian next argues that rule 4-608's requirement to obtain a certificate of probable cause violates due process by establishing a prerequisite to exercising the right to appeal. A defendant appealing a justice court judgment is entitled to a trial de novo without any demonstration of error in the justice court. *See Hinson,* 966 P.2d at 275-76. In this context, we agree it appears unnecessary to require a defendant to demonstrate that the "appeal ... raises substantial issues of law or fact reasonably likely to result in a reversal, an order for a new trial, or a sentence that does not include a term of incarceration in jail or prison." Utah R.Crim. P. 27(f)(2). However, Respondent correctly notes that the burden is the same one imposed in a traditional appeal and that the determination whether to grant or deny a certificate of probable cause has no impact on the outcome of the trial de novo. Although the requirement places a procedural burden on a defendant, we conclude it does not limit the right to appeal through trial de novo.

*3 The claim that a defendant whose case originates in justice court is denied equal protection under the law is without merit. Given the foregoing analysis of two tier systems, allowing the defendant two opportunities for

acquittal does not constitute less favorable treatment. Accordingly, we conclude that the Respondent did not abuse his discretion in denying the motion to dismiss. In the absence of a demonstration that application of rule 4-608 of the Code of Judicial Administration violates Zakharian's substantial constitutional rights, there is no basis from which to conclude that either "gross or flagrant abuse of discretion" or "particularly egregious and momentous legal error" has occurred to justify granting the petition. *State v. Stirba,* 972 P.2d 918, 922 (Utah Ct.App.1998).

We deny the petition for writ of mandamus.

Utah App.,2003.

Zakharian v. Burton

2003 WL 21296817 (Utah App.), 2003 UT App 111

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Zakharian v. Burton 2003 WL 21296817, *3 (Utah App.) (Utah App.,2003)

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
CENTERVILLE CITY, Plaintiff and Appellee,
v.
Sean K. BERNAT, Defendant and Appellant.
No. 20020639-CA.
Nov. 29, 2002.

Second District, Farmington Department; The Honorable Michael G. Allphin.
Benjamin A. Hamilton, Salt Lake City, for Appellant.
Michael D. Direda, Centerville, for Appellee.

Before Judges BILLINGS, BENCH, and THORNE.

MEMORANDUM DECISION (Not For Official Publication)

PER CURIAM:
*1 Appellant Sean Bernat appeals his conviction of alcohol related reckless driving, a class B misdemeanor, which resulted from a trial de novo in the district court following a conviction in Centerville Justice Court. This case is before the court on a sua sponte motion for summary dismissal on the basis that this court lacks jurisdiction over an appeal following a trial de novo "unless the district court rules on the constitutionality of a statute or ordinance." Utah Code Ann. § 78-5-120(7) (Supp.2002).
This appeal is one of several filed by Bernat's counsel seeking to appeal the district court's ruling on the constitutionality of rule 4-608 of the Utah Rules of Judicial Administration. [FN1] The right to appeal a decision of the district court following a trial de novo is limited by statute. *See* Utah Code Ann. § 78-5-120(7) ("The decision of the district court is final and may not be appealed unless the district court rules on the constitutionality of a statute or

ordinance."). In similarly situated appeals seeking review of a district court's denial of a constitutional challenge to rule 4-608(2)(c), this court held that when an appellant "challenges the constitutionality of a rule, rather than a statute or ordinance as specified under the statute, this court is without jurisdiction over the appeal." *State v. Beuchert,* 2002 UT App 266 (per curiam); *Murray City v. Serre,* 2002 UT App 264 (per curiam); *Murray City v. Kvenvold,* 2002 UT App 263 (per curiam). Bernat's collateral challenge to the jurisdictional holding in those decisions is both procedurally inappropriate and without merit . [FN2]

FN1. Counsel's representation that a conditional guilty plea was entered under *State v. Sery,* 738 P.2d 935 (Utah Ct.App.1988), is unsupported by any record evidence that the *Sery* requirements were satisfied. *See State v. Bobo,* 803 P.2d 1268, 1271 (Utah Ct . App.1990) (stating appellant bears burden to demonstrate conditional nature of plea is "unambiguously established" in record). The fact that the sentence was stayed pending appeal is not sufficient evidence of a *Sery* plea. *See id.*

FN2. The proper means to challenge a decision of this court is a timely petition for writ of certiorari. *See* Utah R.App. P. 48.

In response to the sua sponte motion, Bernat suggests that the operation of rule 4-608 in conjunction with section 78-5-120 unconstitutionally limits his right to appeal. [FN3] However, the motion Bernat filed in district court sought only a ruling on the constitutionality of rule 4-608(2)(c) of the Utah Rules of Judicial Administration, that requires a certificate of probable cause, as provided in the Utah Rules of Criminal Procedure, to stay a sentence from justice court pending the appeal, in the form of a trial de novo, in district court. The district court did not rule on the constitutionality of any

statute or ordinance when it denied Bernat's motion. Consequently, this court lacks jurisdiction over the appeal under section 78-5-120(7). This case is not distinguishable from *Beuchert, Serre,* and *Kvenvold.*

FN3. A means to seek review of issues not encompassed within our statutory jurisdiction under Utah Code Ann. § 78-5-120(7) would be through a petition for extraordinary relief. *See Dean v. Henriod,* 1999 UT App 50, ¶ 8, 975 P.2d 946.

Bernat urges this court to certify his appeal to the Utah Supreme Court rather than dismissing it. "When a matter is outside the court's jurisdiction, it retains only the authority to dismiss the action." *Varian-Eimac v. Lamoreaux,* 767 P.2d 569, 570 (Utah Ct .App.1989).
Accordingly, we grant the sua sponte motion and dismiss the appeal for lack of jurisdiction.
Utah App.,2002.
Centerville City v. Bernat
2002 WL 31670359 (Utah App.), 2002 UT App 394
END OF DOCUMENT

CONSTITUTIONAL PROVISIONS

FOURTH & FIFTH AMENDMENTS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Const. Amend. V

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Const. Amend. XIV

The Utah Scheme – Utah's Two Tier Appellate Process in Justice Courts

Utah Code Ann. § 76-5-120
Rule 4-608, Utah Rules of Judicial Administration
Rule 27, Utah Rules of Criminal Procedure

UTAH CODE ANN. § 78-5-120

78-5-120. Appeals from justice court - Trial or hearing de novo in district court.

(1) In a criminal case, a defendant is entitled to a trial de novo in the district court only if the defendant files a notice of appeal within 30 days of:
(a) sentencing after a bench or jury trial, or a plea of guilty in the justice court resulting in a finding or verdict of guilt; or
(b) a plea of guilty in the justice court that is held in abeyance.
(2) If an appeal under Subsection (1) is of a plea entered pursuant to negotiation with the prosecutor, and the defendant did not reserve the right to appeal as part of the plea negotiation, the negotiation is voided by the appeal.
(3) A defendant convicted and sentenced in justice court is entitled to a hearing de novo in the district court on the following matters, if he files a notice of appeal within 30 days of:
(a) an order revoking probation;
(b) an order entering a judgment of guilt pursuant to the person's failure to fulfil the terms of a plea in abeyance agreement;
(c) a sentence entered pursuant to Subsection (3)(b); or
(d) an order denying a motion to withdraw a plea.
(4) The prosecutor is entitled to a hearing de novo in the district court on:
(a) a final judgment of dismissal;

(b) an order arresting judgment;
(c) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;
(d) a judgment holding invalid any part of a statute or ordinance;
(e) a pretrial order excluding evidence, when the prosecutor certifies that exclusion of that evidence prevents continued prosecution; or
(f) an order granting a motion to withdraw a plea of guilty or no contest.
(5) Upon entering a decision in a hearing de novo, the district court shall remand the case to the justice court unless:
(a) the decision results in immediate dismissal of the case;
(b) with agreement of the parties, the district court consents to retain jurisdiction; or
(c) the defendant enters a plea of guilty in the district court.
(6) The district court shall retain jurisdiction over the case on trial de novo.
(7) The decision of the district court is final and may not be appealed unless the district court rules on the constitutionality of a statute or ordinance.

History: C. 1953, 78-5-120, enacted by L. 2001, ch. 122, § 1; 2001 (1st S.S.), ch. 4, § 5.
Rule 4-608, Utah Rules of Judicial Administration

Rule 4-608. Trials de novo of justice court proceedings in criminal cases.
(OLD RULE 4-608)

Intent:
To establish uniform procedures governing trials de novo of justice court adjudications.

Applicability:

This rule shall apply to district and justice courts in trial de novo proceedings where the notice of appeal is filed with the justice court.

Statement of the Rule:
(1) General provisions.
(A) Right to trial de novo. Any party to a judgment of the justice court may obtain a trial de novo.
(B) Venue. The trial de novo of a justice court adjudication in a criminal case shall be heard in the district court location nearest to and in the same county as the justice court from which the appeal is taken. Either party may move for a change of venue under the applicable Rules of Criminal Procedure.
(2) Criminal appeals.
(A) General provisions. The trial de novo of a justice court adjudication in a criminal case shall be held in accordance with Rule 4-803 governing trials de novo in small claims cases, except that no bond for costs on appeal or filing fees shall be required of a criminal defendant.
(B) The notice of appeal. The notice of appeal must be filed within thirty days of the entry of judgment. The justice court shall transmit to the district court a certified copy of the docket, the information or waiver of information, the judgment and sentence and other papers filed in the case within twenty days after receipt of the notice of appeal.
(C) Stay of judgment. Upon the filing of the notice of appeal and the issuance of a certificate of probable cause as provided for in the Rules of Criminal Procedure, the judgment of the justice court shall be stayed.
(D) Orders governing trial de novo. Upon the filing of the notice of appeal, the district court shall issue all further orders governing the trial de novo, including posting of bail and release from custody.
(E) Disposition. The trial de novo shall be conducted in the district court as if the matter were originally filed in that court and the disposition of fine revenue shall be according to

district court procedures. Upon entry of the judgment or final order of the district court, the clerk of the district court shall transmit to the justice court which rendered the original judgment notice of the manner of disposition of the case. Such notice shall be for informational purposes only and shall not be construed as a remand of the case inasmuch as a remand of a de novo proceeding is not authorized.
(F) Appeal from de novo review. The prosecution may take an appeal from a de novo review of the district court only as provided for in the Rules of Criminal Procedure.
(G) Traffic convictions. Notwithstanding the filing of a notice of appeal, if a person is convicted of a traffic offense in justice court, the justice court shall require the person to surrender all of his or her license certificates and the justice court shall forward them with the record of conviction to the Driver License Division within ten days as provided in Utah Code Ann. Section 53-3-218.

Rules History
History: Amended effective January 15, 1990; November 1, 1996; April 1, 1998; April 29, 1999.

Rule 4-608. Trials de novo of justice court proceedings in criminal cases.
NEW RULE 4-608

Intent:
To establish uniform procedures governing trials de novo and hearings de novo of justice court adjudications.

Applicability:
This rule shall apply to district and justice courts in trials de novo and hearings de novo in which the notice of appeal is filed with the justice court.

Statement of the Rule:
(1) Right to appeal. Appeal of a judgment or order of the justice court is as provided in Utah Code Ann. Section 78-5-120.
(2) Venue. The appeal shall be heard in the district court location nearest to and in the same county as the justice court from which the appeal is taken. Either party may move for a change of venue under the applicable Rules of Criminal Procedure.
(3) The notice of appeal. The notice of appeal must be filed within thirty days of the entry of judgment or order. Within twenty days after receipt of the notice of appeal, the justice court shall transmit to the district court a certified copy of the docket, the information or waiver of information, the judgment and sentence and other orders and papers filed in the case.
(4) Stay of judgment. Upon the filing of the notice of appeal and the issuance of a certificate of probable cause as provided for in the Rules of Criminal Procedure, the judgment of the justice court shall be stayed.
(5) Orders. Upon the filing of the notice of appeal, the district court shall issue all further orders governing the trial de novo or hearing de novo, including posting of bail and release from custody.
(6) Proceedings and order of the district court. The district court shall conduct anew the proceedings on which the judgment or order appealed from are based. Unless the case is remanded, the disposition of fine revenue shall be according to district court procedures. Upon entry of the judgment or final order of the district court, the clerk of the district court shall transmit to the justice court which rendered the original judgment notice of the manner of disposition of the case.
(7) Remand. The district court may dismiss the appeal and remand the case to the justice court if the appellant:
(A) fails to appear,
(B) fails to take steps necessary to prosecute the appeal, or

(C) requests the appeal be dismissed.
Upon entering a decision in a hearing de novo, the district court shall remand the case to the justice court as required by Utah Code Ann. Section 78-5-120.
(8) Traffic convictions. Notwithstanding the filing of a notice of appeal, if a person is convicted of a traffic offense in justice court, the justice court shall require the person to surrender all of his or her license certificates and the justice court shall forward them with the record of conviction to the Driver License Division within ten days as provided in Utah Code Ann. Section 53-3-218.
Rules History
History: Amended April 1, 2002.

Rule 27, Utah Rules of Criminal Procedure

Rule 27. Stays pending appeal.

(a) (1) A sentence of death shall be stayed if an appeal or a petition for other relief is pending.
(2) A sentence of fine, imprisonment, or probation shall be stayed if an appeal is taken and a certificate of probable cause is issued.
(3) When an appeal is taken by the state, a stay of any order of judgment in favor of the defendant may be granted by the court upon good cause pending disposition of the appeal.
(b) A person who has been found guilty of an offense and sentenced to a term of incarceration in jail or prison, and who has filed a notice of appeal, shall be detained, unless the trial judge issues a certificate of probable cause and determines by clear and convincing evidence that the defendant is not likely to flee during pendency of the appeal and that the defendant will not pose a danger to the safety of any other person or the community if released under any of the conditions set forth in paragraph (g).

(c) If the trial court denies the defendant a certificate of probable cause, or finds that the defendant is likely to flee or poses a danger to the safety of any other person or the community and denies release, the decision may be appealed to the court in which the notice of appeal of the conviction has been filed.

(d) (1) No certificate of probable cause shall issue except upon application of the defendant filed with the appropriate court.

(2) The application for a certificate of probable cause shall be in writing and accompanied by a memorandum of law identifying the issues to be presented on appeal and supporting the defendant's position that those issues raise a substantial question of law or fact reasonably likely to result in reversal, an order for a new trial or a sentence that does not include a term of incarceration in jail or prison.

(3) If release is denied, any appeal shall be accompanied by an affidavit made and signed by counsel for the defendant, or by the defendant if the defendant is not represented by counsel. The affidavit shall contain the following:

(A) A narration of the relevant facts developed at trial;

(B) A statement of the crime(s) of which the defendant was convicted;

(C) A statement setting out the sentence imposed; and

(D) A statement that the defendant has previously applied for a certificate of probable cause, setting forth the issues that were presented to the court, the court's ruling and the reasons given in support of the ruling.

(e) A copy of the application for a certificate of probable cause and a copy of the memorandum shall be served on the prosecuting attorney. The prosecuting attorney may file a written reply within 10 days after receipt of the application. A hearing on the application shall be held within 10 days after the appropriate court receives the prosecuting attorney's reply, or if no reply is filed, within 15 days after the application is filed with the court.

(f) No certificate of probable cause shall issue and the defendant shall be detained unless the appropriate court finds that the appeal:
(1) is not being taken for the purpose of delay; and
(2) raises substantial issues of law or fact reasonably likely to result in reversal, an order for a new trial or a sentence that does not include a term of incarceration in jail or prison.
(g) If the court determines that the defendant may be released pending appeal, it may release the defendant on the least restrictive condition or combination of conditions that the court determines will reasonably assure the appearance of the person as required and the safety of persons and property in the community, which conditions may include, without limitation, that the defendant:
(1) is admitted to appropriate bail;
(2) not commit a federal, state or local crime during the period of release;
(3) remain in the custody of a designated person who agrees to assume supervision of the defendant and who agrees to report any violation of a release condition to the court, if the designated person is reasonably able to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;
(4) maintain employment, or if unemployed, actively seek employment;
(5) maintain or commence an educational program;
(6) abide by specified restrictions on personal associations, place of abode or travel;
(7) avoid all contact with the victim or victims of the crime(s), any witness or witnesses who testified against the defendant and any potential witnesses who might testify concerning the offenses if the appeal results in a reversal or an order for a new trial;
(8) report on a regular basis to a designated law enforcement agency, pretrial services agency or other agency;
(9) comply with a specified curfew;

(10) refrain from possessing a firearm, destructive device or other dangerous weapon;
(11) refrain from possessing or using alcohol, or any narcotic drug or other controlled substance except as prescribed by a licensed medical practitioner;
(12) undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol abuse or dependency;
(13) execute an agreement to forfeit, upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the defendant as required, and post with the court such indicia of ownership of the property or such percentage of the money as the court may specify;
(14) return to custody for specified hours following release for employment, schooling or other limited purposes; and
(15) satisfy any other condition that is reasonably necessary to assure the appearance of the defendant as required and to assure the safety of persons and property in the community.
(h) The court may at any time for good cause shown amend the order granting release to impose additional or different conditions of release.

History: Amended effective May 1, 1993.

(2)

MAY 5 2005

No. 04-1351

In The

Supreme Court of the United States

Sean Bernat, et. al.,

Petitioners,

v.

The Honorable Michael G. Allphin, et. al.,

Utah Respondents.

On Petition For Writ of Certiorari
To The Utah Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Brent M. Johnson
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QUESTIONS PRESENTED FOR REVIEW

I. Does the Double Jeopardy Clause of the United States Constitution require Utah to automatically vacate a conviction from a trial court when it provides appellate review through a trial de novo standard?

II. Does the Due Process Clause of the United States Constitution prohibit Utah from requiring a defendant to request and obtain a certificate of probable cause in order to gain release pending trial de novo appellate review?

III. Does the Equal Protection Clause of the United States Constitution require the state to treat convicted justice court defendants the same as district court defendants who have successfully appealed their conviction and are facing a retrial, rather than placing justice court defendants in the same position as district court defendants who are appealing their conviction?

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RESPONDENTS RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

The Respondents generally accept the Petitioners' statement of the case insofar as it correctly recites the procedural history of this matter. The Respondents object, however, to some of the characterizations of the court rules and some of the procedures. Much of this will be discussed in the first section of the argument. The Petitioners have otherwise included argument in their statement of the case and they have failed to include relevant portions of the Utah Supreme Court's decision in which the Utah court discussed and denied the Petitioners' claims. The Respondents believe that they are not required to cure Petitioners' deficiencies by providing a complete and correct statement of the case.

ARGUMENT

1. Brief Review of Utah's Trial and Appellate Court Scheme.

A review of the justice systems in the fifty states would most likely reveal differences between all of the states. Each state is entitled to create its own justice system, provided the systems comply with constitutional principles. In determining whether to accept this case, it is important to recognize that each state is different and it will be helpful to understand the trial and appellate court scheme that Utah has established.

In Utah, criminal cases are prosecuted in either a district court or a justice court. District courts are constitutional courts of general jurisdiction, but on the criminal side, the district courts primarily handle felonies and class "A" misdemeanors. See Article VIII, Section 5 of the Utah Constitution. (The Utah laws cited in this response are found in the Appendix, in the order referenced in the brief). Justice courts are statutory courts of limited jurisdiction and handle class "B" and "C" misdemeanors, and infractions. See Utah Code Ann. § 78-5-104. The district court is a court of record and the judges must have law degrees. The justice courts are courts not of record and the judges are not required to have law degrees. See Article VIII, Section 11 of the Utah Constitution.

Justice court criminal proceedings are generally handled the same as district court proceedings. The Utah Supreme Court's Rules of Criminal Procedure apply in both courts. Justice court defendants are entitled to constitutional and statutory protections such as the right to counsel and the right to a jury trial under the same circumstances as in the

district courts. The primary differences between the two courts are that the justice courts are courts not of record and some of the judges do not have juris doctorate degrees. Otherwise, the courts and proceedings are similar.

A defendant convicted in a district court has a right to appeal the conviction to either the Utah Court of Appeals or the Utah Supreme Court, depending on the type of case. A district court defendant who wishes to obtain a stay of the conviction pending appeal may seek a certificate of probable cause under Rule 27 of the Utah Rules of Criminal Procedure. A certificate of probable cause is sought first from the district court and then from the appellate court if the district court request is denied.

A defendant convicted in a justice court is entitled to appeal the conviction to the district court. Because the justice court is a court not of record, the district court's review of the case is a trial de novo. See Utah Code Ann. § 78-5-120. The Utah statutes and rules do not provide that a justice court judgment is automatically vacated upon the filing of a notice of appeal. However, similar to a district court defendant, a justice court defendant may seek a certificate of probable cause to obtain a stay of the justice court sentence pending the trial de novo appellate review. See Rule 38, Utah Rules of Criminal Procedure (formerly Rule 4-608 of the Utah Code of Judicial Administration). The certificate is sought first from the justice court and then from the district court, if denied by the justice court. The granting or denying of the certificate of probable cause is not a condition of being able to appeal the judgment, nor does that decision relate in any way to the subsequent proceedings. At the criminal trial, the prosecutor still has the burden of proof, and the defendant retains all trial court rights, such as counsel, jury and evidentiary rules.

The Utah Supreme Court has determined that the district court proceedings satisfy a defendant's right to appeal. In Monticello v. Christensen, 788 P.2d 513, 516 (Utah 1990) the court stated that "in Utah, at least, it is settled that the right to an 'appeal' from a court not of record is satisfied by provision for a trial de novo in a court of record." The district court trial de novo proceedings constitute an appeal for all practical purposes. According to Utah Code Ann. § 78-5-120(7) "the decision of the district court is final and may not be appealed unless the district rules on the constitutionality of a statute or ordinance." As a true appeal, the Utah Supreme Court has stated that a district court may not impose a sentence harsher than that imposed by the justice court. In Wisden v. District Court of Sevier County, 694 P.2d 605, 606 (Utah 1984), the court stated that "a person's decision to avail himself of the right to appeal . . . may not be impaired by making it conditional on taking the risk of a harsher sentence." The Utah system has thus strived to protect the rights of defendants by providing constitutional and statutory rights at all levels and preserving a true right to appeal.

2. The questions presented for review do not raise an important federal question that must be decided by this Court.

In their petition, the Petitioners have argued that United States Supreme Court precedent requires a state to automatically vacate a judgment from the first tier of a two-tier system,[1] while also arguing that the questions presented

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[1]If this Court accepts this case, it may be helpful to discuss and define the concept of a "two-tier system." Given the wide variety of state systems, the term may actually be of

by this case have never been decided by this Court and therefore must be decided by this Court. The Respondents do not believe that either assertion is correct.

Throughout the state court proceedings, the Petitioners have relied unsuccessfully on several United States Supreme Court cases for the proposition that a state must create a completely clean slate when providing trial de novo, appellate review. As the Utah Supreme Court determined (and the Utah trial courts and the Utah Court of Appeals before it), this court has never declared that such a completely clean slate is constitutionality required. In Colten v. Kentucky, 407 U.S. 104 (1972), the issue was whether a defendant could be subject to a harsher penalty upon exercising the statutory right to a trial de novo in a court of general jurisdiction. The defendant in that case had relied on North Carolina v. Pearce, 395 U.S. 711 (1969). This Court determined that a trial de novo defendant could be subject to a greater penalty in the second proceeding.[2] The question of whether a completely clean slate is required under the Constitution was not addressed by the court. It was simply a fact that the state of Kentucky already provided an arguably clean slate.

One of the issues in Ludwig v. Massachusetts, 427 U.S. 618 (1996) was whether the Double Jeopardy Clause was violated when the state of Massachusetts conducted two separate trials in its two-tier system. In the Massachusetts

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little use in defining some of these systems.

[2]As noted above, the Utah Supreme Court has determined that justice court defendants may not receive a greater penalty on appeal.

system, the right to a jury trial was not afforded in the first court, but was offered on trial de novo. This Court rejected the defendant's argument as being "without substance." Id. at 631. The Court stated that "nothing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal." Id. at 632.

In Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984), another challenge was presented to the Massachusetts trial de novo system. In Lydon, the defendant was convicted in a lower court on evidence that all sides seemed to admit was inadequate. Id. at 297. The defendant subsequently claimed that, because there was insufficient evidence to convict him at the first trial, the second, de novo proceeding violated double jeopardy. Id. at 298. This Court held that double jeopardy was not violated.

The important principle from all of these cases is that this Court has upheld the constitutionality of each of the state schemes that it has reviewed. In reviewing the schemes and the questions presented, this Court has never declared that a state must vacate a conviction prior to proceeding with a trial de novo appeal. This fact supports the Respondents' argument that this Court should not accept this case.

In addition to misunderstanding the United States Supreme Court's decisions on trial de novo systems, the Petitioners' argument misunderstands the concept of double jeopardy. The Double Jeopardy Clause protects a defendant against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. Department of Revenue v. Kurth Ranch, 511 U.S. 767, 769, n.1 (1994). In analyzing double jeopardy claims there are

two primary inquiries. The first is whether jeopardy has attached and the second is whether the jeopardy has released or become complete such that prosecution is barred.

When a Utah justice court defendant is in the position to seek a trial de novo appeal, there is little question that jeopardy has attached in the first proceeding. In jury trials, jeopardy attaches after a jury has been selected and sworn. Illinois v. Somerville, 410 U.S. 458, 466 (1973). In bench trials, jeopardy attaches after the first witness is sworn and the court begins to hear evidence. Crist v. Bretz, 437 U.S. 28, 37, n. 15 (1978). Utah treats the jeopardy as being inextricably attached through the justice court proceeding and the subsequent trial de novo appeal. This position is constitutionally sound. The Petitioners are asking for a directive requiring Utah to nullify the jeopardy that has attached at the justice court. This request is constitutionally infirm. There is nothing in the Double Jeopardy Clause and its attendant protections that would require a state to vacate jeopardy that has previously attached. The Utah Supreme Court wisely recognized this principle.

The problem with the Petitioners' request and analysis is that they equate jeopardy with a conviction. The Petitioners suggest that the only way the state may proceed with a trial de novo is if the conviction is vacated, which the Petitioners argue would thereby vacate and nullify the jeopardy that has attached. This argument misunderstands double jeopardy. This position is beyond any position that has previously been taken by this Court and is not constitutionally required. Review by this Court is therefore not warranted.

3. The Utah Supreme Court's decision does not conflict with other state decisions.

As has previously been noted, an analysis of each state would potentially show fifty different justice systems. The Petitioners claim that the Utah Supreme Court's decision conflicts with other state decisions. The Petitioners have cited several of those cases. However, a review of those decisions will show that none of these states have declared that the United States Constitution requires a state to automatically vacate a conviction when a defendant is provided a trial de novo appeal. Some states have determined that their state statutes require the conviction to be automatically vacated. See e.g. City of Salina, Kansas v. Amador, 85 P.3d 724 (Kan. App. 2004); New Hampshire v. Guy, 667 A.2d 1026 (N.H. 1995); and Clark v. City of Mobile, 357 So.2d 675 (Ala. App. 1978). However, those decisions are based on state statutes and rules and not on the United States Constitution.[3]

The Utah Supreme Court's decision is consistent with its prior treatment of justice court appeals. The decision is consistent with Utah state statutes which treat justice court convictions as final for such purposes as reporting to the drivers license division, even pending an appeal. See Utah Code Ann. § 53-3-218. The decision is also consistent with this Court's decisions and is not in conflict with any other state decisions.

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[3]In the Respondents' opinion, if a federal problem exists, it lies with those states who choose to nullify the jeopardy that has attached. This approach seems more problematic than Utah's approach of affirming jeopardy.

4. The Petitioners have misrepresented the facts related to the due process claims.

The Petitioners have presented two due process arguments. The Petitioners claim that the Utah scheme discourages and burdens the right to appeal and shifts the burden to the accused. The Petitioners' claims are a misrepresentation of Utah law.

As noted in the above sections, the Utah statutes and rules provide a defendant with an opportunity to obtain a stay of a conviction pending appeal. The certificate is not a condition precedent to appeal. The appeal will proceed with or without a certificate. The opportunity for justice court defendants is the same opportunity provided to defendants in the district courts. The certificate is an opportunity to gain release pending appeal. The procedure promotes due process by giving defendants this opportunity. The Petitioners have alleged that the procedure creates potential problems because a defendant may serve a sentence before an appeal is resolved. However, none of the Petitioners have actually faced these circumstances, or been denied a certificate of probable cause. Furthermore, the risk is the same as that faced by other convicted defendants and therefore does not violate due process. The established system has worked for Utah's justice court defendants and review by this Court is not necessary.

5. The Utah scheme does not violate the equal protection clause.

The Petitioners claim that the Equal Protection Clause requires Utah to treat justice court defendants the same as defendants who have successfully appealed and are receiving a retrial. The Utah Supreme Court interpreted the Utah

scheme as placing justice court defendants in the same footing as district court defendants appealing their convictions. This decision is sound and does not require additional review.

The United States Supreme Court has never held that a defendant similar to a justice court defendant must be treated similarly to those in the position of receiving a retrial. The circumstances under which this concept has been mentioned is in the Court's double jeopardy cases. This Court has stated that the reason a defendant subject to a de novo trial is not subject to double jeopardy is similar to the reason that a defendant who successfully appeals a conviction is not subject to double jeopardy. The reason is that both are still under jeopardy until the criminal proceedings have run their course. See Lydon, 466 U.S. at 308 (recognizing the concept of "continuing jeopardy.") The Lydon decision does not require those defendants to be lumped together. The Petitioners have not otherwise provided a significant equal protection argument.

CONCLUSION

The questions presented by the Petitioners do not warrant review by this Court. The Utah Supreme Court's decision is sound. It is throughly reasoned and is based on the Utah trial and appellate court scheme as established by statute and as defined by other Utah Supreme Court cases. A decision by this Court would not affect any state other than Utah and the Utah courts have adequately addressed the issues. Neither the Double Jeopardy Clause, the Due Process Clause, nor the Equal Protection Clause require a state to automatically vacate a conviction if it provides appellate review through a trial de novo. The Petition for a Writ of Certiorari should be denied.

DATED this 2nd day of May, 2005.

Brent Johnson
Attorney for Respondents

Article VIII, Sec. 5., Utah Constitution [Jurisdiction of district court and other courts - Right of appeal.]

Statute text
The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

Utah Code Ann. § 78-5-104. Jurisdiction.

Statute text
(1) Justice courts have jurisdiction over class B and C misdemeanors, violation of ordinances, and infractions committed within their territorial jurisdiction, except those offenses over which the juvenile court has exclusive jurisdiction.
(2) Justice courts have jurisdiction of small claims cases under Title 78, Chapter 6, Small Claims Courts, if the defendant resides in or the debt arose within the territorial jurisdiction of the justice court.

Article, VIII, Sec. 11., Utah Constitution [Judges of courts not of record.]

Statute text
Judges of courts not of record shall be selected in a manner, for a term, and with qualifications provided by statute.

However, no qualification may be imposed which requires judges of courts not of record to be admitted to practice law. The number of judges of courts not of record shall be provided by statute.

Rule 27, Utah Rules of Criminal Procedure. Stays pending appeal.

Rules Text

(a) A sentence of death shall be stayed if an appeal or a petition for other relief is pending.

(a)(2) A sentence of fine, imprisonment, or probation shall be stayed if an appeal is taken and a certificate of probable cause is issued.

(a)(3) When an appeal is taken by the state, a stay of any order of judgment in favor of the defendant may be granted by the court upon good cause pending disposition of the appeal.

(b) A person who has been found guilty of an offense and sentenced to a term of incarceration in jail or prison, and who has filed a notice of appeal, shall be detained, unless the trial judge issues a certificate of probable cause and determines by clear and convincing evidence that the defendant is not likely to flee during pendency of the appeal and that the defendant will not pose a danger to the safety of any other person or the community if released under any of the conditions set forth in paragraph (g).

(c) If the trial court denies the defendant a certificate of probable cause, or finds that the defendant is likely to flee or poses a danger to the safety of any other person or the community and denies release, the decision may be appealed to the court in which the notice of appeal of the conviction has been filed.

(d) No certificate of probable cause shall issue except upon application of the defendant filed with the appropriate court.

(d)(2) The application for a certificate of probable cause shall be in writing and accompanied by a memorandum of law identifying the issues to be presented on appeal and supporting the defendant's position that those issues raise a substantial question of law or fact reasonably likely to result in reversal, an order for a new trial or a sentence that does not include a term of incarceration in jail or prison.
(d)(3) If release is denied, any appeal shall be accompanied by an affidavit made and signed by counsel for the defendant, or by the defendant if the defendant is not represented by counsel. The affidavit shall contain the following:
(d)(3)(A) A narration of the relevant facts developed at trial;
(d)(3)(B) A statement of the crime(s) of which the defendant was convicted;
(d)(3)(C) A statement setting out the sentence imposed; and
(d)(3)(D) A statement that the defendant has previously applied for a certificate of probable cause, setting forth the issues that were presented to the court, the court's ruling and the reasons given in support of the ruling.
(e) When filed in the trial court, a copy of the application for a certificate of probable cause and supporting memorandum shall be served on the prosecuting attorney. When filed in the appellate court, a copy of the application and supporting memorandum shall be served on the Utah Attorney General if the case involved any felony charge, and on the prosecuting attorney if the case involved only misdemeanor charges. An opposing memorandum may be filed within 10 days after receipt of the application. A hearing on the application shall be held within 10 days after the appropriate court receives the opposing memorandum, or if no opposing memorandum is filed, within 15 days after the application is filed with the court.
(f) No certificate of probable cause shall issue and the defendant shall be detained unless the appropriate court finds that the appeal:
(f)(1) is not being taken for the purpose of delay; and

(f)(2) raises substantial issues of law or fact reasonably likely to result in reversal, an order for a new trial or a sentence that does not include a term of incarceration in jail or prison.
(g) If the court determines that the defendant may be released pending appeal, it may release the defendant on the least restrictive condition or combination of conditions that the court determines will reasonably assure the appearance of the person as required and the safety of persons and property in the community, which conditions may include, without limitation, that the defendant: (g)(1) is admitted to appropriate bail;
(g)(2) not commit a federal, state or local crime during the period of release;
(g)(3) remain in the custody of a designated person who agrees to assume supervision of the defendant and who agrees to report any violation of a release condition to the court, if the designated person is reasonably able to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;
(g)(4) maintain employment, or if unemployed, actively seek employment;
(g)(5) maintain or commence an educational program;
(g)(6) abide by specified restrictions on personal associations, place of abode or travel;
(g)(7) avoid all contact with the victim or victims of the crime(s), any witness or witnesses who testified against the defendant and any potential witnesses who might testify concerning the offenses if the appeal results in a reversal or an order for a new trial;
(g)(8) report on a regular basis to a designated law enforcement agency, pretrial services agency or other agency;
(g)(9) comply with a specified curfew;
(g)(10) refrain from possessing a firearm, destructive device or other dangerous weapon;
(g)(11) refrain from possessing or using alcohol, or any narcotic drug or other controlled substance except as

prescribed by a licensed medical practitioner;
(g)(12) undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol abuse or dependency;
(g)(13) execute an agreement to forfeit, upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the defendant as required, and post with the court such indicia of ownership of the property or such percentage of the money as the court may specify;
(g)(14) return to custody for specified hours following release for employment, schooling or other limited purposes; and
(g)(15) satisfy any other condition that is reasonably necessary to assure the appearance of the defendant as required and to assure the safety of persons and property in the community.
(h) The court may at any time for good cause shown amend the order granting release to impose additional or different conditions of release.

Utah Code Ann. § 78-5-120. Appeals from justice court - Trial or hearing de novo in district court.

Statute text
(1) In a criminal case, a defendant is entitled to a trial de novo in the district court only if the defendant files a notice of appeal within 30 days of:
(a) sentencing after a bench or jury trial, or a plea of guilty in the justice court resulting in a finding or verdict of guilt; or
(b) a plea of guilty in the justice court that is held in abeyance.
(2) If an appeal under Subsection (1) is of a plea entered pursuant to negotiation with the prosecutor, and the defendant did not reserve the right to appeal as part of the plea negotiation, the negotiation is voided by the appeal.

(3) A defendant convicted and sentenced in justice court is entitled to a hearing de novo in the district court on the following matters, if he files a notice of appeal within 30 days of:
(a) an order revoking probation;
(b) an order entering a judgment of guilt pursuant to the person's failure to fulfil the terms of a plea in abeyance agreement;
(c) a sentence entered pursuant to Subsection (3)(b); or
(d) an order denying a motion to withdraw a plea.
(4) The prosecutor is entitled to a hearing de novo in the district court on:
(a) a final judgment of dismissal;
(b) an order arresting judgment;
(c) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;
(d) a judgment holding invalid any part of a statute or ordinance;
(e) a pretrial order excluding evidence, when the prosecutor certifies that exclusion of that evidence prevents continued prosecution; or
(f) an order granting a motion to withdraw a plea of guilty or no contest.
(5) Upon entering a decision in a hearing de novo, the district court shall remand the case to the justice court unless:
(a) the decision results in immediate dismissal of the case;
(b) with agreement of the parties, the district court consents to retain jurisdiction; or
(c) the defendant enters a plea of guilty in the district court.
(6) The district court shall retain jurisdiction over the case on trial de novo.
(7) The decision of the district court is final and may not be appealed unless the district court rules on the constitutionality of a statute or ordinance.

Rule 38, Utah Rules of Criminal Procedure. Trials de novo of justice court proceedings.

Rules Text

(a) Right to appeal. Appeal of a judgment or order of the justice court is as provided in Utah Code Section 78-5-120.

(b) Venue. The appeal shall be heard in the district court location nearest to and in the same county as the justice court from which the appeal is taken. Either party may move for a change of venue under the applicable Rules of Criminal Procedure.

(c) The notice of appeal. The notice of appeal must be filed within thirty days of the entry of judgment or order. Within twenty days after receipt of the notice of appeal, the justice court shall transmit to the district court a certified copy of the docket, the information or waiver of information, the judgment and sentence and other orders and papers filed in the case.

(d) Stay of judgment. Upon the filing of the notice of appeal and the issuance of a certificate of probable cause as provided for in the Rules of Criminal Procedure, the judgment of the justice court shall be stayed.

(e) Orders. Upon the filing of the notice of appeal, the district court shall issue all further orders governing the trial de novo or hearing de novo, except that the justice court shall determine the application for a certificate of probable cause.

(f) Proceedings and order of the district court. The district court shall conduct anew the proceedings on which the judgment or order appealed from are based. Unless the case is remanded, the disposition of fine revenue shall be according to district court procedures. Upon entry of the judgment or final order of the district court, the clerk of the district court shall transmit to the justice court which rendered the original judgment notice of the manner of disposition of the case.

(g) Remand. The district court may dismiss the appeal and remand the case to the justice court if the appellant:

(g)(1) fails to appear,
(g)(2) fails to take steps necessary to prosecute the appeal, or
(g)(3) requests the appeal be dismissed.

Utah Code Ann. § 53-3-218. Court to report convictions and may recommend suspension of license - Severity of speeding violation defined. (Underline added)

Statute text
(1) As used in this section, "conviction" means conviction by the court of first impression or final administrative determination in an administrative traffic proceeding.
(2) (a) A court having jurisdiction over offenses committed under this chapter or any other law of this state, or under any municipal ordinance regulating driving motor vehicles on highways or driving motorboats on the water, shall forward to the division within ten days, an abstract of the court record of the conviction or plea held in abeyance of any person in the court for a reportable traffic or motorboating violation of any laws or ordinances, and may recommend the suspension of the license of the person convicted.
(b) When the division receives a court record of a conviction or plea in abeyance for a motorboat violation, the division may only take action against a person's driver license if the motorboat violation is for a violation of Title 41, Chapter 6, Article 5, Driving While Intoxicated and Reckless Driving.
(3) The abstract shall be made in the form prescribed by the division and shall include:
(a) the name and address of the party charged;
(b) the number of his license certificate, if any;
(c) the registration number of the motor vehicle or motorboat involved;
(d) whether the motor vehicle was a commercial motor vehicle;
(e) whether the motor vehicle carried hazardous materials;

(f) the nature of the offense;
(g) the date of the hearing;
(h) the plea;
(I) the judgment or whether bail was forfeited; and
(j) the severity of the violation, which shall be graded by the court as "minimum," "intermediate," or "maximum" as established in accordance with Subsection 53-3-221(4).
(4) When a convicted person secures a judgment of acquittal or reversal in any appellate court after conviction in the court of first impression, the division shall reinstate his license immediately upon receipt of a certified copy of the judgment of acquittal or reversal.